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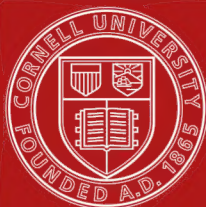
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A TREATISE
ON THE
LAW OF WATERS,
INCLUDING
RIPARIAN RIGHTS,
AND
PUBLIC AND PRIVATE RIGHTS IN WATERS
TIDAL AND INLAND.

BY
JOHN M. GOULD,
OF THE BOSTON BAR.



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PREFACE.

THE present work was begun about three years since with the intention of stating the law upon Riparian Rights, Mill Privileges, and rights in fresh waters only. As the authorities upon Tide Waters were found to be not fully collated elsewhere, and in view of their importance in relation to public and private rights in our large fresh-water rivers and lakes, it was deemed advisable to review also the rules applicable to that topic. The subject of navigable waters, both salt and fresh, is still encumbered by some of the refinements which prevailed before the necessities of modern commerce brought sufficient cases before the courts to clearly define the law, and is affected by ancient usages and local or general laws in certain States, while in others the real or supposed rules of the common law have been held inapplicable. The development of these topics has been traced historically from the earliest times to the present, in England and in this country; the attempt has been made to indicate the principles conducing to harmony; and the aim has been to present exhaustively and concisely all the authorities, ancient and modern, which have been collected by a thorough examination of all the original reports and abridgments.

On account of the difficulty and complexity arising upon questions of substantive law, and the delay incident to a proper consideration of them, the author was

led to entrust to Merritt Starr, Esq., of the Chicago bar, the preparation of that part of the work which relates to Private Remedies at common law, in equity, and under the Mill Acts of different States. To his thorough and efficient labors are due the credit and responsibility of the entire discussion of those topics in Chapter XII. (beyond § 367), and in Chapters XIII. and XIV., subject to verbal changes in order to secure uniformity of style throughout the work, and the division into sections, which were made by the author. He is further indebted to William V. Kellen, Esq., of the Boston bar, for valuable assistance in collecting the authorities in several Southern and Western States, and in the preparation of the original draft of that part of Chapter IX. which relates to surface water, and the latter part of Chapter X.; and to Samuel H. Emery, Jr., Esq., of the Boston bar, for assistance and important suggestions in the revision of proofs. The verification of references throughout the book was done in Boston under the author's supervision.

The hope is indulged, that the great labor expended in collecting from original sources the numerous authorities cited or discussed in each chapter, and in assorting and digesting them, may prove serviceable to the profession in their investigations of a topic, which, from its nature, and the many conflicting interests so frequently involved, will doubtless continue to be as intricate as any in the law.

BOSTON, October, 1883,
63 Sears' Building.

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THE LAW OF WATERS.

THE LAW OF WATERS.

PART I.

PUBLIC WATERS.

CHAPTER I.

OF PROPERTY IN TIDE WATERS AT COMMON LAW.

SECTION.

1. Property in the open sea.
- 2, 3. Rights in territorial waters.
- 4, 5. The Crown's property in tide waters within the realm.
6. What this includes.
- 7-9. The seaward limit of national property and jurisdiction.
10. Right to minerals beneath the sea and seashore.
- 11, 12. *Regina v. Keyn*.
- 13, 14. The authority of this decision.
- 15, 16. Effect of legislation respecting territorial waters.
- 17, 18. The nature of the Crown's title. The *jus publicum* and the *jus privatum*.
19. Foundation of the doctrine of a *jus privatum*.
20. What are included within the public rights of navigation and fishery.
21. Purprestures and nuisances.
- 22, 23. Prescriptive rights against the Crown.
- 24, 25. The rights of the public with respect to sand, gravel, and sea-weed.
26. Bathing.
27. Limits of the shore.
28. Words synonymous with "shore."
29. Meaning of these terms in legal instruments.

§ 1. The sea is serviceable for important uses, especially for navigation and fishery; but it is incapable, from its nature, of permanent appropriation and continuous occupation. It thus remains without an owner, as a barren and unappropriated waste. When articles of value are taken from the sea, they belong to the finder, inasmuch as there is no title which is superior to his possession. Between different claimants what constitutes such possession may depend upon usage. In the whale fisheries, it is a valid usage that the boat first striking a whale shall be entitled to the fish.¹ But, where no special custom of fishery was proved, it was held that the plaintiff, who while fishing had nearly encompassed the fish with his net, could not recover from the defendant for rowing his boat to the opening, thereby disturbing the fish and preventing their capture.² The tests for determining the ownership of such parts of the sea as can be appropriated, or of islands arising therefrom or newly discovered, are occupancy, discovery, or conquest.³ Those, for instance, who expend money in mining guano upon a newly discovered island and convey it to the shore, are entitled to protection in the enjoyment of the property thus acquired.⁴ Ships upon the ocean continue subject to the law of the flag, making those on board amenable to the laws of the nation to which the vessel is accredited.⁵ A

¹ *Fennings v. Grenville*, 1 Taunt. 241; *Littledale v. Smith*, Id. 243, note; *Aberdeen Arctic Co. v. Sutter*, 4 Macq. H. L. Cas. 355; *Young v. Hitchens*, 6 Q. B. 606; *Stevens v. Jeacocke*, 11 Q. B. 741; *Hogarth v. Jackson*, M. & M. 58; *Skinner v. Chapman*, Id. 59, note; *Taber v. Jenny*, 1 Sprague, 315; *Bartlett v. Budd*, 1 Lowell, 223; *Bourne v. Ashley*, 1 Lowell, 27; *Swift v. Gifford*, 2 Lowell, 110. Fish not reclaimed or confined are not the subject of larceny. *Rex v. Carrodice*, 2 Russ. 1199; *State v. Krider*, 78 N. C. 481. A sale of fish afterwards to be caught in the sea is invalid. *Low v. Pew*, 108 Mass. 347.

² *Young v. Hitchens*, 6 Q. B. 606.

³ *Lawrence's Wheat. Int. Law*, pt. II. c. 4, § 5; 2 Black. Com. 3, 8, 258, 400; 3 Kent Com. 318; *Grotius, Mare Lib. c. 5, 7*; *Fleta*, lib. 3, c. 2, §§ 6, 9; *Just. Inst. lib. 2, tit. 1, § 22*; *Schultes, Aquatic Rights*, 45.

⁴ *American Guano Co. v. United States Guano Co.*, 44 Barb. 23. See 11 U. S. Stats. at Large, 119; U. S. Rev. Stats. §§ 5570-5578; *Benson v. Ketchum*, 14 Md. 331; *Whiton v. Albany Ins. Co.*, 109 Mass. 24.

⁵ *Crapo v. Kelly*, 16 Wall. 610; 45 N. Y. 86; 41 Barb. 603; *McDonald v. Mallory*, 77 N. Y. 547; *In re Bye*, 2 Daly, 525; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Reg. v. Bjornsen*, 10 Cox, C. C. 74; *Reg. v. Sattler*, 7 Id. 431;

nation's jurisdiction extends to the punishment of its citizens for offences committed on deserted islands or an uninhabited coast;¹ and the consensus of civilized nations may establish rules for navigators having the force of a law of the sea.² But, with respect to property, the sea is not subject to the

Dears. & B. C. C. 525; Reg. v. Lesley, 8 Cox, C. C. 269; Bell, C. C. 220; Reg. v. Anderson, L. R. 1 C. C. 161; Lawrence's Wheat. Int. Law, pt. II. c. 2, § 4; Wildman's Int. Law, 40; Halleck's Int. Law, 185; Bluntschli, § 317; Parker v. Byrnes, 1 Lowell, 539; Johnson v. 21 Bales, 2 Paine, 601; United States v. Bennett, 3 Hughes, 466; Calahan v. Babcock, 21 Ohio St. 281. The State to which a vessel belongs, and not the United States, is, in this country, the sovereignty whose laws accompany the vessel in respect to matters which are not granted exclusively to the general government or rightfully legislated upon by Congress. Crapo v. Kelly, *supra*; Steamboat Co. v. Chase, 16 Wall. 522; 9 R. I. 419; Sherlock v. Alling, 93 U. S. 99; McDonald v. Malory, 77 N. Y. 546.

¹ United States v. Smiley, 6 Sawyer, 640.

² *Ex parte* McNeil, 13 Wall. 236; The Scotia, 14 Wall. 170, 187; The Continental, 14 Wall. 345; Wilson v. McNamee, 102 U. S. 572; Lord v. Steamship Co., 102 U. S. 541; 1 Kent Com. 27; Vattel, bk. 1, c. 19, § 216; 2 Rutherford's Inst. bk. 2, c. 9, §§ 8, 19. In The Scotia, 14 Wall. 187, Mr. Justice Strong said: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been

its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority, because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Analphitan Table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9, 1863, and in our Act of Congress of 1864, accepted as obligatory rules by more than thirty of the

exclusive dominion of any nation, and cannot be apportioned by municipal law.¹

§ 2. It is somewhat different with respect to those parts of the sea which adjoin the shores of civilized nations. By general consent they have been regarded as capable of appropriation, and of being held by a kind of possession. Maritime countries have claimed from the earliest times a more or less extended dominion over these waters, and subjected them to the laws and regulations of the state; and upon grounds of self-protection and mutual advantage to all such countries, the dominion of the land has been acknowledged to carry with it the control of the contiguous seas,² and the exclusive right to enjoy whatever of value may be acquired therefrom.³ The dominion over the territorial seas, as they are called, may, therefore, include rights of jurisdiction, or of property, or both. By the modern law of nations, the territorial waters extend only to such distance as is capable of command from the shore, or the presumed range of cannon, which, for the purpose of certainty, is regarded as one marine league.⁴

principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them, as, in part at least, and so far as relates to these vessels, the laws of the sea, as having been the law at the time when the collision of which the libellants complain took place. This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is a recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."

¹ Vattel, § 279; Grotius, bk. 2, §§ 3, 7; Cooper's Justinian, 67, § 1; 1 Phil. Int. Law, c. 5.

² Grotius, De Jure Belli, lib. 2, cap. 2, § 13; cap. 3, §§ 13, 2; Loccenius, De Jure Maritimo, c. 4, §§ 5, 6; Puf-

fendorf, De Jure Naturae, lib. 4, c. 2, § 8; Vattel, Droit des Gens, §§ 205, 288-295; Craig, Jus Feud. lib. 1, § 13, p. 140; Wolff, Jus Gentium, c. 1, §§ 128-132; Hautefeuille, Hist. du Droit Maritime, p. 197; Ortolan, Diplomat de la Mer, lib. 1, pp. 174, 175, 177; lib. 2, c. 8, p. 157; Heffter, Pub. Int. Law, §§ 72, 75; Halleck, Int. Law, c. 5, § 13; 1 Kent Com. (12th ed.), 27-30; Manning, Law of Nations (Amos's ed.), p. 119; Lawrence's Wheaton's Int. Law, pt. II. c. 4; 1 Phillimore's Int. Law (2d ed.), 209, 218, 235.

³ Puffendorf, lib. 4, c. 5, § 7; Vattel, lib. 1, c. 23; Schultes, Aquatic Rights, 1-5; Lawrence's Wheaton's Int. Law, pt. II. c. 4, §§ 8, 10; 1 Phillimore's Int. Law (2d ed.), 200, 218, 235; 1 Kent Com. 26-31.

⁴ Ibid. According to some writers a nation may extend its jurisdiction seaward with the increased range of cannon. Hall, Int. Law, 127; 1 Fiore Int. Law, 373; Bluntschli, § 303.

§ 3. Amid the diversity of opinions which have prevailed respecting this dominion, claims have been advanced both as to its extent and character which now seem extravagant.¹ At an early period England claimed dominion over the four seas which surround her coasts, including the right to prohibit foreign vessels from passing over them, and the right of property in them; and in the controversy as to the freedom of the seas in the seventeenth century, the English writers and lawyers, under the lead of Selden,² strenuously maintained

¹ In *Regina v. Keyn*, 2 Ex. D. 63, 176, which is referred to *post*, §§ 11, 12, Cockburn, C. J., thus states some of the views as to the extent of this jurisdiction: "Albericus Gentilis extended it to one hundred miles; Baldus and Bodinus to sixty. Loccenius (*De Jure Maritimo*, c. 4, § 6) puts it at two days' sail; another writer makes it extend as far as could be seen from the shore. Valin, in his *Commentary on the French Ordinances of 1681* (c. 5) would have it reach as far as the bottom could be found with the lead-line, etc."

² Selden's *Mare Clausum* was published in 1635. The doctrine maintained by Selden, so far at least as there was occasion to assert it in treating of the common law, was accepted by his contemporaries, Bacon, Coke, Hale, and Staunford. See 1 Bacon Abr. 640; Co. Litt. 107; Hale, *De Jure Maris*, c. 4, § 6; and *Pleas of the Crown*. Lord Hale says: "The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea; through a whole tract of it, as the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow

seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz. of a *districtus maris*, a place in the sea between such points, or a particular part contiguous to the shore, or of a port or creek or arm of the sea. These may be possessed by a subject, and prescribed in point of interest both of the water, and the soil itself covered with the water within such a precinct; for these are manorial, and may be entirely possessed by a subject." *De Jure Maris*, c. 6. And see *post*, §§ 21-23. The words "*infra quatuor maria*" are said to mean, within the kingdom of England, and the dominions of the same kingdom. Co. Litt. 107. The four seas are: 1. The Atlantic, which washes the western shore of Ireland, and which comprises, as it were by way of subdivision, the Irish Sea, St. George's Channel, and the Scottish Sea to the north-west; 2. The North Sea of the coast of Scotland; 3. The German Ocean on the east; and 4. The British Channel on the south. Co. Litt. 107 (*a*), note 7. The jurisdiction of the king, as lord and sovereign of the sea, has been defined, with respect to the Channel, to extend between England and France, and to the middle of the sea between England and Spain. Sir John Constable's Case, 3 Leon. 73; 5 Com. Dig. 102. With respect to the western and northern oceans, there was said to be more uncertainty as to the limits of British dominion. Selden

the right of the crown of England to these waters, insisting that the title to the sea and to the *fundus maris*, or bed of the sea — *tam aquae quam soli* — was in the king.¹ This is the doctrine of the ancient municipal law of England, under which the Crown had a property in the adjacent seas both as against foreign nations and its own subjects.² Under the civil law, the sea was common property, and the seashore was classed by different writers among the *res communes*, or among the *res publicae*, as being either common property or the property of the state.³ There was here no exclusive or beneficial interest in the sovereign, but so far as private property is concerned, the sea and its shores were considered to be *res nullius*.⁴ By the Roman law, and by the ancient common law, as stated by Bracton, occupancy was the source of title to the sea and the seashore, and pearls, gems, and other things found there, as well as islands which spring up in the

contended for the fullest exercise of dominion over the British seas, both as to the passage through and fishing in them; while Sir Philip Medows suggested more confined rights, as to exclude all foreign ships of war from passing upon any of the seas of England without special license, to have the sole marine jurisdiction within those seas, and also an appropriate fishery. Woolrych on Waters, 5; Selden, Mare Clausum, lib. 1, c. 26. Observations concerning the Dominion and Sovereignty of the Seas, by Sir Philip Medows (1689); Justice's Sea Laws, art. 1, pt. 1; Co. Litt. 107 b, 260 a, note 1, and Hargrave's notes; Hall on the Seashore (2d ed.), 1, 2; Jerwood on the Seashore, 13; Chitty on the Prerogative, 142, 173, 206.

¹ Selden, Mare Clausum, c. 22, 24; Bacon's Abr. tit. Prerogative, B. 3; Hall on the Seashore (2d ed.), 2; Jerwood on the Seashore, 13; Co. Litt. 107 a, 260 a, and notes; 4 Inst. 60; 2 Roll. Abr. 169, 170; Royal Fishery of the Banne, Sir John Davies, 149; Sir John Constable's Case, 3 Leon. 71, 73; Staunford's Abr.; Life of Sir Leo-line Jenkins, vol. 2, p. 732; Sir Philip

Medow's Observations; Justice's Sea Laws, art. 1.

² Ibid. Lord Hale says: "The narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not. This is abundantly proved by that learned treatise of Master Selden called Mare Clausum; and therefore I shall say nothing therein, but refer the reader thither." De Jure Maris, c. 4; Hargrave's Law Tracts, 10. Lord Hale refers frequently in the same treatise to "the property and jurisdiction of the king of England in the narrow seas." See Hargrave's Law Tracts, 31, 32, 41, 43.

³ The seashore was classed among things common by Justinian (I. 2, 1, 1); but Celsus says (D. 43, 8, 3) that it belonged to the state. See Mackenzie's Roman Law, 152; Goudsmit's Roman Law, 113, note.

⁴ Taylor's Summary of the Civil Law, 471; Inst. lib. II. tit. 1, §§ 1, 2, 5; Dig. lib. 43, tit. 12-14; Bracton, lib. I. c. 12, fol. 7, 8; lib. II. fol. 7, § 5; 2 Domat, Civil Law, vol. 1, I. tit. 2, § 1.

sea, and derelict goods, belonged to the finder or first occupant.¹ The rule of the modern common law, whereby the king has a private interest, apart from the ownership of the adjoining lands, in those tide waters which are *within* the territory of England, appears to be connected historically with the above claim of sovereignty over the narrow seas, and to be derived therefrom.²

§ 4. By the present law of England, the Crown has the right of property in the arms and inlets of the sea within the realm, if not in the sea itself.³ This right includes the bed of all tide waters which are or may be within the counties.⁴ The strip of land along the coast which is daily covered and left bare by the tide, and is called the shore,⁵ is a part of the county when the tide is out and a part of the sea when the tide is in.⁶ There is here *divisum imperium* between the

¹ Inst. II. 1, § 18; Dig. XLI. 1, § 7; 1 Twiss's Bracton, 68; Greene's Roman Law (3d ed.), 74; Howe v. Stowell, Alcock & Nap. 348, 358.

² See *post*, § 19. England's claim of exclusive jurisdiction over all persons navigating the British seas appears to have been very ancient. These seas, says Sir Travers Twiss, under the name of "quatuor maria," are thrice mentioned by Bracton and distinctly designated as "les quatre mers d'Angleterre" in four different places in the Domus Day of Gippeswich. Law Mag. & Rev. 4th series, vol. 2, pp. 150, 151. While Bracton, writing in the thirteenth century upon the laws of England, thus speaks of the four seas, he makes no mention of any peculiar rights of property possessed by the Crown in them. He follows the civil law, and says that the sea and its shores are common property. Bk. I. c. 12, fol. 7, 8. This has a tendency to show that the theory of jurisdiction preceded that of property. Sir Travers Twiss observes, in the article above referred to (pp. 155, 160): "The claim to the lordship of

the 'narrow sea,' which the student (Doctor and Student, 270) asserts for the kings of England, cannot be traced so far back as their claim to the lordship of 'the four seas,' unless upon the principle that *omne majus continet in se minus*. Nevertheless, the lordship of 'the narrow sea,' as asserted by the Commons of England in the reign of Henry V., rested on a more solid pretext of right than the lordship of 'the four seas.' It rested on a principle of public law, which holds good in the present day in respect of the stream of navigable rivers, namely, that the kings of England, being in physical possession of both shores of the British Channel, were in juridical possession of the waters contained between those shores. . . . The jurisdiction of the Admiralty, on the other hand, rests upon juridical principles totally distinct from those of territorial sovereignty. It was originally a personal jurisdiction."

³ *Post*, §§ 5-10.

⁴ Regina v. Keyn, 2 Ex. D. 63.

⁵ *Post*, § 27.

⁶ See next note.

courts of common law, whose jurisdiction is limited by the boundaries of counties, and the courts of admiralty which have jurisdiction of questions arising upon the sea,—the first having jurisdiction at low tide and the latter at high tide.¹ The seashore is thus, during parts of each day, within the limits of the adjacent county, and, as far as the ordinary high-water mark, it is the property of the Crown.² Rivers and parts of rivers, in which the tide ebbs and flows, are also within the body of the county, although the admiralty may also have jurisdiction in them, and the soil of such rivers, so far as the tide reaches inland and up their shores,

¹ *Constable's Case*, 5 Rep. 106 *a*; *The Admiralty*, 12 Co. 79, 80; *Regina v. Two Casks of Tallow*, 2 Hagg. 294; Co. Litt. 260; 4 Inst. 135; *Finch*, L. 75, 78; 1 Black. Com. 110, 112; 4 Id. 268; 2 Hale, P. C. c. 3; 2 East, P. C. 803; 1 Kent Com. 366; *The Pauline*, 2 C. Rob. 358; *Embleton v. Brown*, 3 El. & El. 234; *Regina v. Musson*, 8 El. & Bk. 900; *Regina v. Keyn*, 2 Ex. D. 63, 66, 67; *Rex v. 49 Casks of Brandy*, 3 Hagg. Adm. 257; *Lopez v. Andrew*, 3 M. & R. 329; *Barber v. Wharton*, 2 Ld. Raym. 1452; *De Lovio v. Boit*, 2 Gall. 398; *United States v. Davis*, 2 Sumner, 482; *United States v. Wilson*, 3 Blatch. 435; *Weston v. Sampson*, 8 Cush. 347, 354.

² *Ibid.*; Hale, *De Jure Maris*, c. 4; 1 Hargr. Law Tracts, 12, 13; 1 Black. Com. 110, 264; *Constable's Case*, 5 Rep. 106 *a*; *Dyer*, 326; *Attorney General v. Burridge*, 10 Price, 350; *Attorney General v. Parmenter*, 10 Price, 378, 412; *Blundell v. Catterall*, 5 B. & Ald. 268; *Colchester v. Brooke*, 7 Q. B. 339; *Lopez v. Andrew*, 3 M. & R. 329; *Attorney General v. Chambers*, 4 De G. M. & G. 206; *Lowe v. Govett*, 3 B. & Ad. 863; *Scrutton v. Brown*, 4 B. & C. 485; *Somerset v. Fogwell*, 5 B. & C. 883; *Attorney General v. London*, 1 H. L. Cas. 440; 8 Beav. 270, and 12 Beav. 8, 171; 2 MacN. & G. 247; *In re Hull & Selby Railway*, 5 M. & W. 327; *Benest v.*

Pipon, 1 Knapp, 60; *Attorney General v. Tomline*, 12 Ch. D. 214; 5 Com. Dig. 102; *Calmady v. Rowe*, 6 C. B. 861, 878; 2 Dane Abr. 694; *Commonwealth v. Alger*, 7 Cush. 53; *Weston v. Sampson*, 8 Cush. 347; *Commonwealth v. Roxbury*, 9 Gray, 451, 482; 3 Kent Com. 427, 431; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Goodtitle v. Kibbe*, 9 How. (U. S.) 471; *State v. Sargent*, 45 Conn. 358; *Bell v. Gough*, 21 N. J. L. 156; 22 Id. 441; 23 Id. 624; *Stevens v. Paterson Railroad Co.*, 37 N. J. L. 340; *Galveston v. Menard*, 23 Texas, 349; *Teschemacker v. Thompson*, 18 Cal. 11; *People v. Davidson*, 30 Cal. 379.

The main or high sea begins at low water-mark on the external coast. *United States v. Wiltberger*, 5 Wheat. 76, 94; *United States v. Pirates*, 5 Wheat. 184, 200; *De Lovio v. Boit*, 2 Gall. 398, 428; *United States v. Hamilton*, 1 Mason, 152; *The Abby*, 1 Mason, 360; *United States v. Grush*, 5 Mason, 290; *United States v. Robinson*, 4 Mason, 307; *United States v. Sea-grist*, 4 Blatch. 420; *United States v. Wilson*, 3 Blatch. 435; *Johnson v. Twenty-one Bales*, 2 Paine, 601; *United States v. Smith*, 3 Wash. C. C. 78, *n.*; *The Martha Anne*, Olcott, 18; *Miller's Case*, Brown Adm. 156; 1 Black. Com. 110.

appertains to the Crown.¹ The territorial jurisdiction of a State now extends seawards to the distance of three geographical miles;² and where bays and inlets are formed by the indentations of the coast, even though they are somewhat broader than the double range of cannon, this external limit of jurisdiction is determined by measuring seaward from a straight line drawn from one enclosing headland to the other.³ Such inlets and branches of the

¹ Royal Fishery of the Banne, Sir John Davies, 149; *Bulstrode v. Hall*, Sid. 149; *Fitzwalter's Case*, 1 Mod. 105 and 3 Keb. 242; *Warren v. Matthews*, 6 Mod. 63 and Salk. 357; *Carter v. Murcot*, 4 Bur. 2162; *Rex v. Smith*, 2 Dougl. 441; *Bagott v. Orr*, 2 Bos. & P. 472; *Ball v. Herbert*, 3 T. R. 253; *Blundell v. Catterall*, 5 B. & Ald. 268; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 Ad. & El. 314; *Murphy v. Ryan*, 1 R. 2 C. L. 143; *Attorney General v. Chambers*, 4 De G. M. & G. 206; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Whitstable Free Fishers v. Gann*, 11 H. L. Cas. 192; 19 C. B. n. s. 803; 13 Id. 853, and 11 Id. 387; *Penryhn v. Holme*, 2 Ex. D. 328; *Mayor of Carlisle v. Graham*, L. R. 4 Ex. 361; *Smith v. Officers of State*, 13 Jur. 713; *Lord Advocate v. Hamilton*, 1 Macq. 46; 1 Black. Com. 264; 8 Bacon's Abr. tit. Prerogative, B. 3; 5 Com. Dig. Navigation, A., B.; 1 Roll. Abr. 168, 169; *Selden, Mare Clausum*, 251; *Hale, De Jure Maris*, 11, 12; *Palmer v. Mulligan*, 3 Caines, 307; *Adams v. Pease*, 2 Conn. 481; *McManus v. Carmichael*, 3 Iowa, 1; *Carson v. Blazer*, 2 Binney, 475; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 199; *Weston v. Sampson*, 8 Cush. 347; 1 Dane Abr. 690, 692; 1 Kent Com. 367; 3 Id. 427; *Martin v. Waddell*, 16 Peters, 367; *Hagan v. Campbell*, 9 Porter, 40. The part of a tidal river thirty miles from its mouth is not the "sea" within the meaning of 48 Geo. III. c. 75, so

as to render the county chargeable with the expense of burying persons whose bodies are cast ashore from a wreck occurring near such spot. *Church Wardens v. Robertson*, 44 L. T. n. s. 747.

² *Bynkershoek, De Dominio Maris*, c. 2, p. 257; *Pando, Elem. del Der. Int.* 155; *Loccenius, De Jure Maritimo*, c. 4; *Heineccius*, lib. 2, c. 3, § 12; *Grotius, De Jure Belli*, lib. 2, c. 3, § 13; *Vattel, Droit des Gens*, lib. 1, c. 23, §§ 288-295; *De Rayvenal, Liberté des Mers*, vol. 1, p. 212; *Wolff, Jus Gentium*, §§ 128-132; *Azuni*, vol. 1, 67, 68; *Ortolan, Diplom. de la Mer*, vol. 1, bk. 2, c. 8; *Hautfeuille, Hist. du Droit Mar.* 197; *Marten, Precis du Droit*, bk. 2, c. 1, §§ 40, 41, and bk. 4, c. 4; *Heffter, Pub. Int. Law*, § 75; 1 *Phillimore's Int. Law*, c. 4, § 154, and c. 8, § 196; *Lawrence's Wheaton's Int. Law*, pt. II. c. 4, §§ 6-10; 1 *Kent Com.* 28; *Manning's Law of Nations* (Amos' ed.), 118, 119; *Regina v. Keyn*, 2 Ex. D. 63; *The Maria*, 1 C. Rob. 352; *The Twee Gebroeders*, 3 C. Rob. 162; *The Annapolis*, Lush. Adm. 295; *The Leda*, Swa. Adm. 40; *Regina v. 49 Casks of Brandy*, 3 Hagg. Adm. 247; *The Saxonia*, 15 Moore, P. C. 262; *Gammel v. Commissioners of Woods*, 3 Macq. 419, 465; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; 13 C. B. n. s. 853, and 11 Id. 387; *General Iron Screw Co. v. Schurmanns*, 1 J. & H. 180; *Church v. Hubbard*, 2 Cranch, 187; *United States v. Kessler*, Bald. 15.

³ *Post*, § 5; *Regina v. Cunningham*,

sea, when sufficiently narrow, and within this line of jurisdiction, may be within the body of the adjacent county.¹ When shut in and protected by the land, they form harbors and havens. They may also be established as ports. A harbor or haven is a place for the shelter and safe riding of ships; a port is a haven and something more.² How-

Bell, C. C. 86; Phillimore's Int. Law, pt. III. c. 8; Lawrence's Wheaton's Int. Law, pt. II. c. 4, § 6; Manning's Law of Nations, 120; 1 Twiss, Law of Nations, c. 10; Martens, *Precis du Droit*, § 40; Ortolan, *Diplom. de la Mer*, bk. 1, c. 2, and bk. 2, c. 7; 1 De Cussy, *Droit Marit.*, tit. 2, § 40; Klüber, *Droit des Gens*, § 130.

¹ Hale, *De Jure Maris*, c. 4; 4 Co. Inst. 140; Fitzherbert's Abr. 399; Regina v. Cunningham, Bell, C. C. 86; Direct U. S. Cable Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394, 419; Ins. Co. v. Dunham, 11 Wall. 1; The Fame, 3 Mason, 147; De Lovio v. Boit, 2 Gall. 398; 1 Kent Com. 30; *post*, § 5.

² The following are among the more important passages upon this subject, in Hale's *De Portibus Maris*: "A haven is a place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent, that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous or violent winds; as Milford haven, Plymouth haven, and the like. And these are some larger, some narrower. The smaller are sometimes made or at least helped by art; the greater are made only by nature. A *port* is an haven, and somewhat more. 1st, it is a place for arriving and unloading of ships or vessels. 2nd, it hath a superinduction of a civil signature upon it—somewhat of franchise and privilege, as shall be shown. 3rd, it hath a *ville* or city or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their

goods, and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come, safe situation against winds, where they may safely lie, and a good shore where they may well unlade; something that is artificial, as keys and wharfs and cranes, and warehouses and houses of common receipt; and something that is civil, viz., privileges and franchises, *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles; as the port of London anciently extended to Greenwich, in the time of King Edward the First. . . . A *creek* is of two kinds; viz., creeks of the sea, and creeks of ports. The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz., creeks of ports, are by a kind of civil denomination such. They are such, that though, possibly, for their extent and situation they might be ports, yet they are either members of, or dependent upon other ports. And it began thus: The king could not conveniently have a customer and comptroller in every port and haven; but these custom officers were fixed at some convenient port; and the smaller adjacent ports became, by that means, creeks, or appendants of that where these custom officers were placed." Hale, *De Portibus Maris*,

ever commodious the haven may be, and whatever protection to vessels it may afford, it is not a port unless

c. 2; Hargrave's Law Tracts, 46-48. "It is a part of the *jus regale* or royalty of the Crown of England originally and *de novo* to erect publick ports in this kingdom. As all franchises within the kingdom are derived from the Crown, either immediately and explicitly; as by new erection, grant, or charter, or presumptively and consequentially, as by custom or prescription; so in a special manner are the ports and the franchises thereof." Id. c. 3; Hargrave's Law Tracts, 53, 54. "In all publick sea-ports in England, there are three kinds of rights that meet; and though they are distinct one from another, yet they consist one with another, whether the ports belong in point of franchise or propriety to the king or to a subject. 1st, *Jus privatum*, interest of propriety or franchise. 2nd, *Jus publicum*, the common interest that all persons have to resort to or from publick ports, as publick sea-marts or markets, with their goods, and wares, and merchandises. 3rd, *Jus regium*, or the right of superintendency and prerogative that the king hath for the safety of the realm, or benefit of commerce, or security of his customs. . . . The *jus privatum* takes in these several branches; 1st, The right of the lord or owner of the port. 2nd, The right of those that have the propriety of the shore contiguous to the port. 3rd, The right of the town, or ville, that is the *caput portus*, and the inhabitants thereof. . . . Though of common right, the king is *prima facie* the owner and lord of every publick sea-port, yet a subject may by charter or prescription be lord or owner of it. . . . The ownership of propriety is, where the king or common person by charter or prescription is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest

of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath had that liberty time out of mind or by the king's charter." Id. c. 6; Hargrave's Law Tracts, 72, 73. Id. c. 4; Hargrave, 54, 55. "Though A. may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to B. and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to A. for he hath what he had before, viz., the interest of the soil, and consequently the improvement of the shore and the liberty of fishing; and as the creek was free for any to pass in it against all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unlade." Id. c. 6; Hargrave, 73. . . . "When a port is fixed or settled by such means, though the soil and franchise or dominion thereof *prima facie* be in the king or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade, and intercourse. And this publick right consists principally in these: 1st, They ought to be free and open for subjects and foreigners, to come and go with their merchandise. . . . 2nd, There ought to be no new tolls or charges imposed upon them without sufficient warrant, nor the old inanced. . . . 3rd, They ought to be preserved from impediments and nuisances that may hinder or annoy the access or abode or recess of ships and vessels and seamen, or

it has been established as such by authority of the Crown.¹ Hence, in ports, not only is the ownership of the soil vested

the unloading or relading of goods. Nuisances of ports are of two kinds: 1. Such as are immediately only nuisances to the private concernment of the lord of the franchise of the town that is *caput portus*. . . . 2. Such nuisances as are common to all men that have occasion to come, go, or stay at ports. I will give instances of some. 1. Silting or choaking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port, whereby it is choaked. 2. Decay of the wharfs, keys, and piers, which are for the landing of merchandise and safe-guard of shipping. 3. The leaving of anchors in the port without buoys or marks, whereby ships or vessels may strike against them and be spoiled. 4. The building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed. 5. The straightening of the port, by building too far into the water, where ships or vessels might have formerly ridden; for it is to be observed, that nuisance or not nuisance in such case is a question of fact. It is not therefore every building below the high water mark, nor every building below the low water mark, is *ipso facto* in law a nuisance. For that would destroy all the keys that are in all the ports in England. For they are all built below the high water mark; for otherwise vessels could not come at them to unlade; and some are built below the low water mark. And it would be impossible for the king to licence the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, for the king cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the seawater from diffusing at large; and the water may flow in shallows, where

it is impossible for vessels to ride. Indeed, where the soil is the king's, the building below the high water mark is a purpresture, an encroachment, and intrusion upon the king's soil, which he may either demolish or seize, or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a nuisance or not is *quaestio facti*, and to be determined by a jury upon evidence, and not *quaestio juris*. . . . A port or publick passage may not be obstructed; nay, if it begins to be silted or stopped, yet it must be scoured, and cannot be wholly dammed or filled up, although another cut be made as beneficial as the former, without an inquisition by writ of *ad quod damnum* finding it to be no damage to the publick, and the king's licence thereupon obtained; as appears by the writ of *ad quod damnum* cited formerly to another purpose. Register 252. . . . As to the provisions by the common law we are to observe, that as the common law hath intrusted the king with the patronage and protection of the *jura publica*, as highways, publick rivers, ports of the sea, and the like; so the care of preventing and reforming of publick nuisances therein is left to him, and his courts of justice, the prosecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue." Id. c. 7; Hargrave, 84-87.

¹ Foreman v. Whitstable Free Fishers, L. R. 4 H. L. 266; L. R. 3 C. P. 584; Nicholson v. Williams, L. R. 6 Q. B. 632; Case of the London Wharfs, 1 Sir W. Black. 581; Jenkins v. Harvey, 1 C. M. & R. 877; Falmouth v. George, 5 Bing. 286; Exeter v. War-

prima facie in the Crown, but there is the further prerogative right to determine what places shall be ports, and to grant the privilege of erecting them; and the king may first grant the soil to A, and afterwards grant the franchise of a port to B,¹ if the vested rights of A are not impaired by the second grant.² Ports are for the receipt of goods and the collection of the customs, and a subject cannot legally land or ship customable goods on his own land or in creeks or havens, or other places out of ports, unless it be in case of danger or necessity.³ Ports have been styled the gates of the kingdom,⁴ and are established and controlled by the king as guardian of the realm.⁵

§ 5. With respect to the larger arms of the sea, such as bays, estuaries, and sounds, the rule is that "that arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county."⁶ The

ren, 5 Q. B. 773; *Yarmouth v. Eaton*, 3 Burr. 1402; Hale, *De Portibus Maris*, c. 2; 2 Black. Com. 499.

¹ Hale, *De Portibus Maris*, c. 6. See note 2, *ante*, p. 10.

² *Exeter v. Warren*, 5 Q. B. 773.

³ *Per Holroyd, J.*, in *Blundell v. Catterall*, 5 B. & Ald. 268; *The Baltimore Wharf Case*, 3 Bland Ch. 383.

⁴ Ports are thus frequently characterized in the older authorities. 1 Black. Com. 264; 2 Feud. 1, 56; F. N. B. 113; *Royal Fishery of the Banne*, Sir John Davies, 149; Hale, *De Portibus Maris*, c. 3, 7; Hargrave's *Law Tracts*, 50, 54; Bacon *Abr. tit. Prerogative*, D. 5; *Com. Dig. tit. Navigation*; Chitty's *Prerogatives of the Crown*, 100.

⁵ *Ibid.*

⁶ Hale, *De Jure Maris*, c. 4; 2 Hale, P. C. 16, 17, 54; Staunford, P. C. bk. 1, p. 51; Hawkins, P. C. pt. 2, c. 9, § 14; 4 Inst. 140; Fitzherbert's *Abr. Corone*, 399; *Case of the Admiralty*, 12 Co. 79; *Cunningham's Case*, Bell, C. C. 86;

Rex v. Bruce, Russ. & Ry. 243, and 2 Leach, C. C. 1093; *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394; *King v. Sologuard*, Andrew, 231; *Leigh v. Burley*, Owen, 122; *Regina v. Keyn*, 2 Ex. D. 63; *The Eleanor*, 6 Rob. Adm. 39; *The Public Opinion*, 2 Hagg. Adm. 398; *The Eliza Jane*, 3 *Ibid.* 335; *United States v. Bevans*, 3 Wheat. 336, 387; *United States v. Grush*, 5 Mason, 290; *The Harriet*, 1 Story, 251; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 483; *Commonwealth v. Peters*, 12 Met. 387; *Dunham v. Lamphere*, 3 Gray, 268, 270; *People v. Supervisors*, 73 N. Y. 393, 396; *United States v. Robinson*, 4 Mason, 307; *DeLovio v. Boit*, 2 Gall. 398, 425; *United States v. Wiltberger*, 5 Wheat. 106; 2 Hawkins, P. C. c. 9, § 14; 2 East, P. C. 804; *Com. Dig. tit. Adm. E.*; Bacon's *Abr. tit. Admiralty*, A.; 1 Kent Com. 366, 367. See *United States v. Ross*, 14 American Law Rev. 530; 2 Browne, *Civ. & Adm. Law*, 92.

rule being dependent upon the eyesight, is somewhat difficult of application. The bay or inlet must be so narrow that persons and objects can be comprehended across it by the naked eye; and while in each case it is a question of fact to be determined upon the evidence, yet the weather and the size and distinctness of the objects may cause variation and uncertainty.¹ This question is distinct from that of the territorial jurisdiction of the nation,² which is determined by the presumed range of cannon, and by measuring three miles seaward from the exterior limit of the bay, and not by the line itself. Certain bays and estuaries of the sea, which are greater in width than six miles, or the double range of cannon, may be within the limits of counties and of the nation. Islands which lie within arms of the sea, and are also within the county, have been regarded as opposite shores within the foregoing rule,³ and in treaties between nations,⁴

Hale thus refers to the same rule again in *De Portibus Maris*, c. 7 (Hargrave's Law Tracts, 88): "By the book of 8 E. 2 Corone, every arm or creek of the sea within the points of the land, where a man may discern clearly from side to side, is within the body of the county. Yet the admiral hath used at least a concurrent jurisdiction in many such creeks and arms of the sea, up to the first bridges as to matter of nuisances, upon a mistake, perchance, of the words *les points* in the printed statute of 16, R. 2, c. 3, whereas some read it *points*."

¹ *United States v. Bevans*, 3 Wheat. 336; *United States v. Grush*, 5 Mason, 290; *Commonwealth v. Peters*, 12 Met. 387; *Dunham v. Lamphere*, 3 Gray, 268. In the recent case of *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394, 417, Lord Blackburn, referring to Coke and Hale (see *ante*, § 4, note) said: "Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or

discerning. If it means to say what men are doing, so, for instance, that eye-witnesses on shore can say who was to blame in a fray on the waters, resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manœuvres, it would be very much more extensive. In either sense it is indefinite."

² *Ante*, § 4, and note 1, p. 15.

³ *Per Story, J.*, in *United States v. Grush*, 5 Mason, 290, 301.

⁴ Thus, in the treaty of 1867, between England and France, as to Sea Fisheries, confirmed by act of Parliament in 1868 (31 & 32 Vict. c. 45), it was provided that "the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland," and that these miles "are geographical miles, whereof sixty make a degree of latitude."

and in the works of writers upon international law,¹ bays having a width of ten miles have been conceded to be a part of the territory of the nation by which they are enclosed. In *Regina v. Cunningham*,² the question was whether certain foreigners, who had committed a crime upon a foreign vessel lying in the Bristol Channel, were subject to the jurisdiction of the common-law courts in the county of Glamorgan. Although the place where the offence was committed was below low-water mark, beyond any river, and at a point where the sea was more than ten miles wide, it was held to be within the body of the adjacent county. It would necessarily be within the territory of England, since the counties cannot extend beyond the limits of the nation.³ In this case, the situation and condition of the place in question were considered, and the fact that it had always been treated as a part of the county of Glamorgan was regarded as a strong illustration of the principle that the whole of the Bristol Channel was within the adjacent counties.⁴ It is established that the right of property in all the soil which is covered by tide water, and is also a part of the nation's territory, is *prima facie* in the Crown by the common law.⁵

¹ Manning's Law of Nations, 120. In the law of nations, bays are regarded as part of the territory of the country when their dimensions and configuration are such as to show that the nation occupying the coast also occupies the bay as part of its territory. Wheaton's Int. Law (8th ed.), 255, 256, *n.*, 325; Grotius, De Jure Belli, bk. 2, c. 3, §§ 7, 8; Vattel, bk. 1, c. 3, § 290; Ortolan, Diplom. de la Mer, bk. 2, c. 8; 1 Phillimore's Int. Law, § 200; 1 Kent Com. 28, 29; Direct U. S. Cable Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394, 419. In this country, a territorial jurisdiction has been claimed over extensive portions of the sea, including waters within lines drawn from distant headlands. 1 Kent Com. 30.

² Bell, C. C. 86.

³ Direct U. S. Cable Co. v. Anglo-

American Telegraph Co., 2 App. Cas. 394, 419; *Regina v. Keyn*, 2 Ex. D. 63. See *Commonwealth v. Peters*, 12 Met. 387; *Commonwealth v. Alger*, 7 Cush. 82; *Commonwealth v. Roxbury*, 9 Gray, 451, 494, 512, note; *Pollard v. Hagan*, 3 How. 230.

⁴ Bell, C. C. 86. Compare *Chase v. American Steamboat Co.*, 9 R. I. 419; *s. c. nom. Steamboat Co. v. Chase*, 16 Wall. 522, in which usage was relied upon as showing that Narragansett Bay is within the jurisdiction of the common-law courts of Rhode Island, and not of the admiralty exclusively. *Sherlock v. Alling*, 93 U. S. 99, 104. As to the jurisdiction over Long Island Sound, see *Mahler v. Norwich Transportation Co.*, 35 N. Y. 352; *Keyser v. Coe*, 9 Blatch. 32; *The Sloop Elizabeth*, 1 Paine, C. C. 10.

⁵ *Ante*, § 4; Direct U. S. Cable

§ 6. The title to land under water is not changed when the soil becomes bare, and the Crown is entitled to land which is left by the sudden recession of tide waters within the realm, and to islands which arise therefrom.¹ In strictness, also, the Crown has the right of property in all things which are found upon the seashore between high and low-water mark, and have no acknowledged owner, such as seaweed, amber, jet, etc., and in minerals lying under the navigable waters of the kingdom.² The ancient franchise of royal fish taken within the arms of the sea or in the narrow seas,³ and the right to wreck, *i.e.*, to goods from a lost vessel which were thrown upon the shore,⁴ also belonged to the Crown in virtue of the royal prerogative, and formed one of the ordinary branches of the king's revenue. But these rights, although originally associated with the dominion of the sea, were not enjoyed as appurtenant to the ownership of the sea or the seashore, for the king might grant them to a subject without granting the shore; or, he might grant the wreck to one person and royal fish to another, and the shore itself to a third person.⁵ According to Hale and Coke, a grant by the Crown to an individual of the right to take wreck, raises a *prima facie* presumption that the seashore itself was also intended to pass, inasmuch as a ship cannot

Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394; Regina v. Keyn, 2 Ex. D. 63.

¹ Hale, De Jure Maris, c. 4, 6; Anon. Dyer, 326 b; Rex v. Yarborough, 2 Bligh, N. S. 162; Callis on Sewers, 45, 47.

² Post, § 10.

³ Post, § 20. This prerogative was treated as not obsolete in 1831. Lord Warden v. The King, 2 Hagg. Adm. 438.

⁴ Hale, De Jure Maris, c. 7; Hargrave's Law Tracts, 37-41; 2 Co. Inst. 167; 1 Black. Com. 202, 283, 290; 3 Id. 106; Callis on Sewers, 40; Sir Henry Constable's Case, 5 Co. 107; Sir John Constable's Case, Anderson, 86; Bracton, lib. 3, 120, § 5; Com. Dig. tit. Prerogative, D. and

Wreck; Phcar's Rights of Water, 99; 2 Kent Com. 321, 322; Woolrych on Waters, 11; Jerwood on the Seashore, 57; The Pauline, 2 Rob. Adm. 358; Rex v. 49 Casks of Brandy, 3 Hagg. 257; Rex v. 2 Casks of Tallow, Id. 294; Palmer v. Rouse, 3 H. & N. 505; Talbot v. Lewis, 6 C. & P. 603; Barry v. Arnaud, 10 Ad. & El. 646; Sutton v. Buck, 2 Taunt. 355; Hamilton v. Davis, 5 Burr. 2732; Blundell v. Catterall, 5 B. & Ald. 268; Dunwich v. Sterry, 1 B. & Ad. 831; Alcock v. Cooke, 2 M. & P. 625; Legge v. Boyd, 1 C. B. 92; Stackpoole v. The Queen, Ir. R. 9 Eq. 620; The Tilton, 5 Mason, 477.

⁵ Ibid.; Anon. 6 Mod. 149; Scrutton v. Brown, 4 B. & C. 485; Hall on the Seashore (2d ed.), 80, 82; Talbot v. Lewis, 1 C. M. & R. 495; 5 Tyr. 1.

be a wreck, within the legal meaning of the term, without being cast upon the land between high and low-water mark;¹ but the better view appears to be that the right to wreck is a franchise, which carries with it no right to the soil of the seashore.² A grant of the shore does not pass wreck of the sea without express words.³

§ 7. Prior to the recent case of *Regina v. Keyn*,⁴ the open seas around the coasts of Great Britain were considered to be the property of the Crown, and it was commonly said that the sea is not only under the king's dominion, but that it is his proper inheritance.⁵ According to Selden and the writers of his time,⁶ the king is lord of the great waste, both land and water. Lord Hale says⁷ that the king is owner of this waste, and that the narrow sea adjoining the coast of England is "part of his dominions, whether it lie within the body of any county or not." In ancient times, it was declared⁸ that the sea is within the legiance of the king, as of his crown of England; and in the *Rolls of Parliament*,⁹ in the reign of Henry V., it appears that the Commons prayed that whereas the king and his progenitors have always been lords of the sea, and now it happens that the king is lord of the coasts of both sides of the sea, that therefore the king will lay an imposition upon strangers passing over the sea. Coke, Bacon, Blackstone, Chitty, and Woolrych,¹⁰ writing-

¹ Hale, *De Jure Maris*, c. 6; Hargrave's *Law Tracts*, 27; Constable's Case, 5 Rep. 107; *Calmady v. Rowe*, 6 C. B. 861; *Rex v. Ellis*, 1 M. & S. 662; *Beaufort v. Swansea*, 3 Exch. 413; *Talbot v. Lewis*, 6 C. & P. 606; *Parsons v. Smith*, 5 Allen, 578.

² *Ibid.*; *Phear's Rights of Water*, 52; *Hall on the Seashore* (2d ed.), 20, 76, 81-99; *Dickens v. Shaw*, *Ibid.* App. 54, 66.

³ *Alcock v. Cook*, 2 M. & P. 625.

⁴ 2 Ex. D. 63; *post*, § 11.

⁵ *Royal Fishery of the Banne*, Sir John Davies, 149, 152; 16 Vin. Abr. tit. Prerogative, B.; 1 Roll. Abr. 528; 2 Id. 168, 170; Com. Dig. tit. Prerogative; Molloy, *De Jure Maritimo* (9th

ed.), 207; Sir John Constable's Case, 3 Leon. 71, 73.

⁶ Selden, *Mare Clausum*, lib. 2, c. 22, 24; *Hall on the Seashore* (2d ed.), 2; *ante*, § 3.

⁷ Hale, *De Jure Maris*, c. 4, 5; 1 Hale, P. C. 154; 2 Id. 12-15.

⁸ Rich. II.; Fitzherbert, tit. Protection, 46; *Royal Fishery of the Banne*, Sir John Davies, 149, 152; *Callis on Sewers*, 39; Hale on Adm. Jurisdiction, cited in *Commonwealth v. McLoon*, 101 Mass. 1, 12, pl. 5.

⁹ 1 Rot. Parl. 8 Hen. V. N. 6; 16 Vin. Abr. tit. Prerogative, B.; Woolrych on Waters, 19.

¹⁰ Co. Litt. 107, 260 *b*, § 439; Bacon's Abr. tit. Court of Admiralty; 1 Black.

at different periods, reassert the same doctrine; and Callis considers that, by the common law, the king has, in the English seas, possession and rights of property as well as of jurisdiction.¹

§ 8. The narrow seas were thus considered to be within the realm of England.² Although the Admiralty now has exclusive jurisdiction of questions arising upon the ocean, yet it appears that a concurrent jurisdiction was formerly exercised by the common-law courts in cases of felonies done upon the narrow seas, although they were still regarded as high seas.³ Under this theory, the Crown was entitled to royal fish which were captured in the British seas, though not to those taken in the seas beyond,⁴ and to islands which

Com. 110; 2 Id. 264; Chitty's Pre-rogatives of the Crown, 142, 173, 206. See also Hall on the Seashore, 13; Schultes, Aquatic Rights, 1-5; Jerwood on the Seashore, *passim*.

¹ Callis (on Sewers, 39-41, 53) says; "Touching our Mare Anglicum, in whom the interest therein is, and by what law the government thereof is, is a fit question, and worth the handling. And in my argument therein I hope to make it manifest by many proofs and precedents of great worth and esteem, that the king hath therein these powers and properties, *videlicet*: (1) *Imperium regale*; (2) *Potestatem legalem*; (3) *Proprietatem tam soli quam aquae*; (4) *Possessionem et profitum tam reale quam personale*. And all these he hath by the common laws of England."

² 1 Hale, P. C. 424; 2 Ibid. 13-17; Hale, De Jure Maris, c. 4; 1 Com. Dig. 369; 4 Inst. 134, 137; 2 East, P. C. 803; 6 Dane's Abr. 355; Attorney General v. Tomsett, 2 Cr. M. & R. 170, 174; The Twee Gebroeders, 3 C. Rob. 336; 1 Phill. Int. Law, c. 6, 7.

³ Ibid.; Commonwealth v. McLoon, 101 Mass. 1.

⁴ Britton, c. 17. "Touching royal fish, therefore called so, because of

common right such fish, if taken within the seas parcell of the dominion and Crown of England, or in any creeks or armes thereof, they belong to the Crown; but if taken in the wide sea, or out of the precincts of the seas belonging to the Crown of England, they belong to the taker. 39 E. 3, 35, *per* Belknap. Touching the kind of these fishes that are called royal fish, there seem to be but three, viz.: sturgeon, porpoise, and *balaena*, which is usually rendered a whale. . . . But because they may be great fish that come under no known denomination, we find the claim of such under the name of *piscis regius*, or sometimes *grand pisce*, without any certain denomination. . . . But salmon or lamprey are not royal fish. By the common right of the king's prerogative these belong to the king, if taken within his seas or the armes thereof. Anciently the intire sturgeon belonged not to the king, but only the head and the tail of the whale, according to Bracton, cited by Staunford upon this chapter of the prerogative. According to the custom used in the admiralty, these great fish, if taken in the salt water within the king's seas, they were divided, and a moiety was allowed to

arose from these waters.¹ So broad a claim has not been sanctioned by the acquiescence of other nations,² yet it is asserted by modern writers upon the common law,³ and was insisted upon by the British government in the present century.⁴

§ 9. It has been held by eminent judges that the Crown retains within the three-mile belt the rights which were formerly appropriated to it over entire seas. Thus, in the case of the *Whitstable Free Fishers v. Gann*,⁵ which involved the right to collect tolls for anchorage beyond low-water mark, Erle, C. J., laid down broadly that "the soil of the seashore, to the extent of three miles from the beach, is vested in the Crown." When this case came before the House of Lords on appeal,⁶ Lord Wensleydale appears to have assented⁷ to that rule, as he also did upon another occasion;⁸ but

the taker, the other moiety to the admiral in right of the king." *De Jure Maris*, c. 7, 4, 6; Hargrave's *Law Tracts*, 42, 43; Woolrych on *Waters*, 63.

¹ *Ante*, § 6.

² Ortolan, *Diplom. de la Mer*, tom. 1, liv. 2, c. 15; Grotius, *Mare Liberum*; Vattel, *Droit des Gens*, liv. 1, c. 23, § 289; Martens, *Precis du Droit des Gens*, liv. 2, c. 1, § 42; 11 *Edinburgh Review*, art. 1, pp. 17-19; Klüber, § 132; Lawrence's *Wheaton's Int. Law* (2d ed.), pt. II. c. 4, p. 328. According to an ancient record between Edward the First of England and Philip the Fair of France, all the maritime nations of Europe assented to the exclusive possession and dominion of the English kings in the seas of England. Selden, *Mare Clausum*, lib. 2, c. 23; 4 *Co. Inst.* 142; 1 *Roll. Abr.* 528, pl. 2; 6 *Vin. Abr. tit. Court of Admiralty*, 2; 1 *Molloy, De Jure Maritimo* (9th ed.), c. 5, pl. 14; Woolrych on *Waters*, 5.

³ Chitty on the *Prerogative*, 143, 173, 206; Woolrych on *Waters*, 41; Hall on the *Seashore* (2d ed.), 2, 3, 154; Schultes on *Aquatic Rights*, 1-5.

⁴ In 1803 the negotiations for a settlement of the controversy between this country and England, as to the impressment of seamen by British cruisers from American merchant vessels, were broken off in consequence of the British government insisting that the "narrow seas" should be excepted out of the sphere over which the contemplated stipulations against impressment should extend. See Lawrence's *Wheaton's Int. Law* (2d ed.), pt. II. c. 2, p. 211. Saluting the flag was the usual recognition of England's dominion over the seas. 1 *Phillimore's Int. Law*, 100. Mr. Hall refers to a regulation of the English Admiralty, as existing in 1805, by which English war vessels were directed to insist upon the salute of the flag over the sea south of England as far as Cape Finisterre. Hall's *Int. Law*, 121.

⁵ 11 C. B. n. s. 387, 413.

⁶ 11 H. L. Cas. 192; see the same case before the Exchequer Chamber, 13 C. B. n. s. 853.

⁷ p. 213.

⁸ *Gammel v. Commissioners of Woods*, 3 Macq. 419, 465. Lord Wens-

Lord Chelmsford, adverting more directly to the statement of Erle, C. J., and recognizing it so far as it related to territorial property and jurisdiction as against foreign powers, doubted its correctness with reference to the subjects of England.¹ So, according to Lord Cranworth,² Judge Story,³ and Chief Justice Shaw,⁴ the right of soil in the sea as well as the shore was in the Crown by the common law. In the case of *The Leda*,⁵ Dr. Lushington, although not passing directly upon the Crown's right of property in the sea, held

leydale here said that "the distance of three miles, by the acknowledged law of nations, belongs to the coast of the country." See *Regina v. Keyn*, 2 Ex. D. 63, 120, 124, 227.

¹ 11 H. L. Cas. 217, 218. Lord Chelmsford here said: "With great respect for the learned Chief Justice, I do not think it can be assumed as an unquestionable proposition of law, that, as between the Crown and its subjects, the seashore, to the extent mentioned, is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. In stating the right of the Crown in the seashore, the text-writers invariably confine it to the soil between high and low-water mark. The three miles limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation."

² *Attorney General v. Chambers*, 4 De Gex, Mac N. & G. 206, 213.

³ *The Brig Ann*, 1 Gall. 62. See *Church v. Hubbard*, 2 Cranch, 187, 234.

⁴ *Commonwealth v. Roxbury*, 9 Gray, 451, 482; *Weston v. Sampson*, 8 Cush. 347, 351; *Commonwealth v. Alger*, 7 Cush. 53, 82; *Dunham v. Lamphere*, 3 Gray, 268.

⁵ *Swabey's Adm.* 40; In *Chase v. American Steamboat Co.*, 9 R. I. 419, 426, Potter, J., said, in discussing the admiralty jurisdiction under the Constitution of the United States: "Before the adoption of the Constitution, the State had jurisdiction over the bay (Narragansett Bay), and over the coasts of the sea, to the extent of the marine league. Lawrence's *Wheaton*, 321, 933; 6 *Dane's Abr.* 359, &c.; 3 *Hagg. Adm.* 290, 375; *De Lovio v. Boit*, 2 *Gallis.* 398, 425. See opinion of Johnson, J., in *Ramsay v. Allegre*, 11 *Wheat.* 614. This jurisdiction was exercised by its courts of common law." Mr. Dane says that "the realm includes the narrow seas and the coasts" (6 *Dane's Abr.* 356); and that at the date of the Massachusetts charter (1691), the admiralty jurisdiction was "exclusive on the high seas, the common highway of nations, without the territorial line, usually cannon shot from the shore; concurrent with the common law on the coasts between the shore and that line, and without the bodies of counties, and within them only such admiralty limited jurisdiction the said prior statutes gave, and that was the colonial view of the subject." 6 *Dane's Abr.* 357.

that the words "United Kingdom," as employed in a statute with reference to salvage, included both the land of the kingdom and three miles from the shore. In *Church v. Hubbard*,¹ in the Supreme Court of the United States, the question was whether an insurance company was liable for a vessel named the *Aurora*, which was seized and condemned some four or five leagues from the coast of Brazil for attempting to trade illicitly. Marshall, C. J., said: "That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act, which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory." In *United States v. Smiley*,² the defendant was indicted for the larceny of treasure lost from a wreck and buried in the sea sand within one hundred and fifty feet from the shore of Mexico. Field, J., held that the jurisdiction of that country over all offences committed within a marine league from its shores, not on a vessel of another nation, was complete and exclusive, and that the United States had no jurisdiction over the place or the property.

§ 10. In the present century the question arose in England as to the rights of the Queen and the Prince of Wales, as Duke of Cornwall, to the mines and minerals under the sea adjoining the coasts of Cornwall. This involved the right of

¹ 2 Cranch, 187, 234; *Hudson v. vis*, 2 Sumner, 482; *Montgomery v. Gustier*, 4 Cranch, 293; *The Brig Ann*, Henry, 1 Dall. 49; *People v. Tyler*, 1 Gall. 62; *United States v. Kessler*, 7 Mich. 161; 8 Mich. 320. *Bald. C. C.* 15; *United States v. Da-* ² 6 Sawyer, 640.

property in minerals between high and low-water mark around the coasts of that county, and also the right of property in minerals beyond low-water mark, won by an extension of workings begun above low-water mark, and was determined by arbitration.¹ It appeared that the Prince was in possession, and had worked the mines from land which was his own. With respect to the title beyond low-water mark, it was contended, on behalf of the Crown, that the bed of the sea was its property; and on behalf of the Prince it was insisted, first, that under the terms of the original grant from the Crown, the Duke of Cornwall acquired everything adjoining and connected with the county, and that, even if the bed of the sea elsewhere belonged to the Crown, it had passed to the Duke in the seas adjoining Cornwall;² second, that the bed of the sea did not belong to the Crown by the common law, but that the Prince was entitled to the mines as first occupant. The decision of the arbitrator was that all the mines and minerals lying under the seashore between high and low-water marks, and under the estuaries, tidal rivers and other places beyond low-water mark, which were within the county, belonged to the Prince as part of the soil and territorial possessions of the Duchy of Cornwall; but that the right to all mines and minerals beyond low-water mark, under the tide waters adjacent to, but not part of, the county, was vested in the Queen in right of her Crown, although won by workings commenced above low-water mark and extended below it.³ An act of Parliament was passed to give effect to this decision.

¹ This arbitration is reviewed in *Regina v. Keyn*, 2 Ex. D. 63, at pages 121, 155-158, 199-202. See, also, 6 Law Mag. & Rev. 113. The reference was made by Lord Chancellor Cranworth on the part of the Queen, and by Lord Kingsdown, then Chancellor of the Duchy of Cornwall, on the part of the Prince of Wales, to the arbitration of Sir John Patteson. A further question, involving the construction of the Act of Parliament referred to in the text, was afterwards referred to the arbitration of Sir John Coleridge. See opinion of Coleridge,

C. J., in *Regina v. Keyn*, 2 Ex. D. 63, 155-157. Lord Coleridge here says that all the proceedings in both references were in writing, that he was furnished with copies of the whole of them, and that most of the authorities cited in the case then before the court were cited there, as well as some others of considerable importance.

² See *Trematon Case*, Wightwick, 167; *Attorney General v. St. Aubyn*, Id. 270; *Penryhn v. Holm*, 2 Ex. D. 328; *Regina v. Keyn*, 2 Ex. D. 63.

³ 21 & 22 Vict. c. 109.

ion in favor of the Crown, by which it was declared and enacted that all mines and minerals lying below low-water mark under the open sea adjacent to but not being part of the county of Cornwall were, as between the Queen, in right of her Crown, and the Prince, in right of his Duchy of Cornwall, vested in the Queen "in right of her Crown as part of the soil and territorial possessions of the Crown." It would seem that the Prince, being owner of the shore between high and low-water marks around the county, would control the access from the land to the bed of the sea; and that, as he was the first occupant of the mines, the Crown could be held to be the owner of the *fundus maris* beyond the limits of the county, independently of a title to the shore, only under the supposed rule of the common law, while the Crown's rights in the sea-bottom adjacent to but beyond the limits of Cornwall would, according to this arbitration and statute, be similar to those which it had been thought to possess around all the coasts of the kingdom.¹

§ 11. In *Regina v. Keyn*,² it appeared that the *Franconia*, a German vessel, while proceeding from one foreign port to another, negligently came in collision with an English vessel off Dover, and at a point less than three miles distant from the coast of England. It was held that the defendant, who was in command of the *Franconia*, and was charged with manslaughter for causing the death of a passenger upon the English vessel, was not subject to the jurisdiction of the English admiralty.³ The six judges who dissented from this conclusion were of the opinion that the territory of England and the jurisdiction of the Crown, and the Admiral, included the

¹ See the judgment of Amplett, J. A., and Lord Coleridge, C. J., in *Regina v. Keyn*, 2 Ex. D. 63, 121, 155-158, and the criticism upon this arbitration by Cockburn, C. J., in the same case, 2 Ex. D. 199-202. See *post*, § 12.

² 2 Ex. D. 63.

³ The trial was in the Central Criminal Court, to which the jurisdiction of the admiral over crimes was trans-

ferred by Stat. 4 & 5 Will. 4, c. 36; Stat. 7 & 8 Vict. c. 2. The judge who presided at the trial reserved the question of jurisdiction for the Court for Crown Cases Reserved. The case was argued a second time in this court before fourteen judges. Archibald, J., one of this number, died before judgment, but agreed with the majority.

waters within the three-mile belt, and the fact that the passenger's death occurred upon an English vessel was regarded by Lord Coleridge, C. J., and Denman, J., as sustaining the jurisdiction.¹ It was also held that express legislation is necessary to confer upon the courts jurisdiction over foreign vessels passing near the coast; that the Admiralty had not such jurisdiction in the particular case under the statutes then in force; that, with respect to both property and jurisdiction, the territorial seas and the ocean beyond are alike high seas, open to the peaceful navigation of all nations,² and that the territory of England extends only to low-water mark on the external coast.³

§12. Of the opinions delivered in *Regina v. Keyn*, that of Cockburn, C. J.,⁴ contains the fullest discussion of the ques-

¹ See *Reg. v. Coombes*, 1 Leach, C. C. 388; *Commonwealth v. Macloon*, 101 Mass. 1. The admiralty has no jurisdiction of an offence committed by a foreigner upon a foreign vessel upon the high seas beyond the three-mile belt, even when the offence is committed against English subjects. *Reg. v. Serva*, 1 Den. C. C. 104; *Reg. v. Lewis*, 1 Dearsley & Bell, C. C. 182; *Regina v. Keyn*, 2 Ex. D. 63.

² *Regina v. Keyn*, 2 Ex. D. 63, 70, 77, 82, 91, 119, 206, 217; *The Saxonia*, 1 Lush. 410; 11 H. L. Cas. 192; L. R. 4 H. L. 266; *The Twee Gebroeders*, 3 C. Rob. 336, 352; *The Vigilantia*, 1 C. Rob. 1; *The Catharina*, 5 C. Rob. 161; *The Success*, 1 Dodd's Adm. 131; *United States v. Kessler*, 1 Bald. C. C. 15, 17.

³ In *Manning's Law of Nations* (Amos's ed.), 119, the purposes for which jurisdiction over the sea may be exercised under the law of nations are said to be: (1) the regulation of fisheries; (2) the prevention of frauds on custom laws; (3) the exaction of harbor and lighthouse dues; and (4) the protection of the territory from violation in time of war between other states. This passage was noticed and

apparently approved in *Regina v. Keyn*. See, also, *Reg. v. 49 Casks of Brandy*, 3 Hagg. Adm. 247, 289; *Merlin*, Rep. de Juris, vol. 10, p. 135; *Ortolan*, *Diplom. de la Mer*, vol. 1, p. 157, 174-177; *United States v. Kessler*, 1 Bald. C. C. 34; *The Leda*, Swa. Adm. 40; *General Iron Co. v. Schurmanns*, 1 J. & H. 193; *Wheaton's Int. Law*, pt. II. c. 4, §§ 6-10; 1 *Kent Com.* (12th ed.), 28; *Kent, Int. Law*, 115; *Manning's Law of Nations* (Amos's ed.), 119; *Vattel*, lib. 1, c. 23, § 295; *Church v. Hubbard*, 2 Cranch, 234.

⁴ The learned judge (2 Ex. D. 177, 178) regards *Bynkershoek*, whose treatise *De Dominio Maris* was published in 1702, as the first to limit the territorial jurisdiction over the sea to the range of cannon. After reviewing the diverse opinions expressed by various writers with reference to the character and extent of this jurisdiction, the opinion proceeds: "But it is said that, although the writers on international law are disagreed on so many essential points, they are all agreed as to the power of a littoral state to deal with the three-mile zone as subject to its dominion, and that consequently we may treat it as sub-

tions considered and of the Crown's property in the sea. The learned judge, adverting to the fact that Selden, Hale,

ject to our law. But this reasoning strikes me as unsatisfactory, for what does this unanimity in the general avail us when we come to the practical application of the law in the particular instance, if we are left wholly in the dark as to the degree to which the law can be legitimately enforced? This unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local state, may go far to show that, by the concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to show that, in the absence of such legislation, the ordinary law of the local state will extend over the waters in question — which is the point which we have to determine.

Not altogether uninfluenced, perhaps, by the diversity of opinion to which I have called attention, the argument in support of the prosecution presents itself—not without some sacrifice of consistency—in more than one shape. At one time it is asserted that, for the space of three miles, not only the sea itself, but the bed on which it rests, forms part of the territory or realm of the country owning the coast, as though it were so much land; so that the right of passage and anchorage might be of right denied to the ships of other nations. At another time it is said that, while the right is of a territorial character, it is subject to a right of passage by the ships of other nations. Sometimes the sovereignty is asserted, not as based on territorial right, but simply as attaching to the sea, over which it is contended that the nation owning the coast may extend its law to the foreigner navigating within it. To those who assert that to the extent of three miles from the coast, the sea

forms part of the realm of England, the question may well be put, When did it become so? Was it so from the beginning? It certainly was not deemed to be so as to the three-mile zone, any more than as to the rest of the high seas, at the time the statutes of Richard II. were passed. For in those statutes a clear distinction is made between the realm and the sea; the jurisdiction of the admiral being (subject to the exception already stated as to murder and mayhem) confined strictly to the latter, and its exercise "within the realm" prohibited in terms. In these statutes the jurisdiction of the admiral is restricted to the high seas, and in respect of murder and mayhem, to the great rivers below the bridges, while whatever is within the realm, in other words within the body of a county, is left within the domain of the common law. There is no distinction taken between one part of the high sea and another. The three-mile zone is no more dealt with as within the realm than the seas at large. The notion of a three-mile zone was in those days in the womb of time. When its origin is traced, it is found to be of comparatively modern growth. The first mention of it by any writer, or in any court of this country, so far as I am aware, was made by Lord Stowell, with reference to a question of neutral rights, in the first year of the present century, in the case of *The Twee Gebroeders* (3 C. Rob. 162). To this hour it has not, even in theory, yet settled into certainty. For centuries before it was thought of, the great landmarks of our judicial system had been set fast—the jurisdiction of the common law over the land and the inland waters contained within it, forming together the realm of England, that of the admiral over

and other early writers who assert an unrestricted sovereignty over the sea,¹ wrote at a period when the three-mile rule was altogether unknown, and in support of England's dominion over the whole of the narrow seas, concluded that, as this theory is now exploded, the unlimited jurisdiction and the rights of property maintained by these writers cannot be revived so as to attach to the distinct dominion since acquired over the territorial seas; that no distinction being suggested by them between one part of the narrow seas and another, no time can be designated when the three-mile zone became part of the realm; that the assertions of publicists and jurists, even if in harmony, could not add to the territory of a nation or confer jurisdiction upon its courts; that the right to erect wharves, piers, breakwaters, forts, etc., upon the open sea-coast below low-water mark, would be determined merely by the prior occupancy of the space covered by them; and that, while such encroachments, being commonly in aid of navigation, are readily acquiesced in,² it would be worthy of consideration, if the case arose, whether there would not be just cause for complaint if they obstructed navigation by foreign vessels.

the English vessels on the seas, the common property or highway of mankind." Reference is made to the statements of Selden, Hale, Coke, and Blackstone (see *ante*, § 7) and it is then said (p. 196): "To what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. . . . No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me to follow that when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is

gone, the territorial property which was suggested to be consequent upon it must necessarily go with it. But we are met here by a subtle and ingenious argument. It is said that although the doctrine of the criminal jurisdiction of the admiral over foreigners on the four seas has died out, and can no longer be upheld, yet, as now, by the consent of nations, sovereignty over this territorial sea is conceded to us, the jurisdiction formerly asserted may be revived and made to attach to the newly acquired domain. I am unable to adopt this reasoning."

¹ *Ante*, § 7.

² If erected for purposes of defence, they are within the principle that a nation may do what is necessary for the protection of its own territory. *Per* Cockburn, C. J., 2 Ex. D. p. 199.

§ 13. The decision in *Regina v. Keyn* was that of a bare majority of a court composed of thirteen judges, and it is uncertain how far it may be approved in this country.¹ Lord Hale thought it no objection to the theory of sovereignty over the narrow seas that it extended the rights and jurisdiction of the king beyond the counties,² and, under that theory, the sea and the land appear to have been regarded as distinct territories.³ If, as Cockburn, C. J., suggests,⁴ the three-mile rule was adopted as a compromise of the earlier diverse claims, there would, perhaps, be no inconsistency in maintaining that it limited this dominion in extent but did not change its character, which, by the common law, if not by the law of nations, included rights of property as well as of jurisdiction.⁵ In this country, counties are dependent for their existence upon the consent of the legislature, which may change their boundaries at pleasure, if not restricted by express constitutional provisions;⁶ and to

¹ The decision in *Regina v. Keyn* is binding upon all the English courts. *Harris v. The Franconia*, 2 C. P. D. 173. See *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394. In *Blackpool Pier v. Fyde Union*, 46 L. J. M. C. 189, the part of a pier which was beyond low-water mark was held to be beyond the realm, and not ratable as an extra-parochial place, under 31 & 32 Vict. c. 122, § 7.

² "The narrow sea adjoining to the coast of England is part of the waste and demesnes and dominions of the king of England, whether it lie within the body of any county or not." *De Jure Maris*, c. 4; Hargrave's *Law Tracts*, 10. See also Hale's unpublished treatise on Admiralty Jurisdiction, quoted by Gray, J., in *Commonwealth v. Macloon*, 101 Mass. 1, 12, pl. 5.

³ In 1 Molloy, *De Jure Maritimo* (9th ed.), c. 5, pl. 14, note, it is said, with reference to the four seas: "The right unto the sea ariseth not from the possession of the shores; for the sea and land make distinct

territories, and by the laws of England, the land is called the realm, but the sea the dominion; and as the loss of one province doth not infer that the prince must resign up the rest, so the loss of the land territory doth not by concomitancy argue the loss of the adjacent sea."

⁴ 2 Ex. D. 63.

⁵ *Ante*, §§ 7-10.

⁶ *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Burns v. Clarion Co.*, 62 Penn. St. 425; *Windham v. Portland*, 4 Mass. 589; *Opinion of the Justices*, 6 Cush. 578; *Stone v. Charlestown*, 114 Mass. 214; *Eagle v. Beard*, 33 Ark. 497; *Dodson v. Fort Smith*, Id. 508; *Bittle v. Stuart*, 34 Ark. 224, 231; *Reynolds v. Holland*, 35 Ark. 56; *Albernathy v. Dennis*, 49 Mo. 468; *State v. Shortridge*, 56 Mo. 126; *Opinion of Supreme Court*, 55 Mo. 295; *Woods v. Henry*, *Ibid.* 560; *Baltimore v. State*, 15 Md. 376; *Groff v. Frederick City*, 44 Md. 67; *Frederick v. Goshon*, 30 Md. 436; *Wade v. Richmond*, 18 Gratt. 583; *Manly v. Raleigh*, 4 Jones Eq. 370; *Love v.*

declare that the external bounds of a State upon the sea-coast are limited by those of its counties, is but another form of saying that both depend upon the will of the legislature. According to the decisions in the State courts, these boundaries are not necessarily identical.¹ Thus, in *Schooner Norway v. Jensen*,² in Illinois, Breese, C. J., said, with reference to the western part of Lake Michigan: "It is true, no portion of this vast body of water has been assigned to the counties bordering upon it, or received in any manner the attention of the legislature, yet it is, nevertheless, a portion of the navigable waters of this State and of our territory." The right of fishing within the distance of three miles from the shore was not considered in *Regina v. Keyn*, and appears to belong exclusively to the inhabitants of the littoral State.³

Schenck, 12 Ired. 304; *Wallace v. Trustees*, 84 N. C. 164; *People v. Hill*, 7 Cal. 97; *San Francisco v. Canavan*, 42 Cal. 541; *State v. Branin*, 3 Zab. 485; *Pell v. Newark*, 40 N. J. L. 71; *Detroit v. Blackeby*, 21 Mich. 84; *Barner v. District of Columbia*, 91 U. S. 540; *Beckwith v. Racine*, 7 Biss. 142.

¹ *Mahler v. Norwich Transportation Co.*, 35 N. Y. 358; 45 Barb. 226; 30 How. 237; *Manley v. People*, 7 N. Y. 295, 299, 303; *Dunham v. Lamphere*, 3 Gray, 268, 270; *Commonwealth v. Roxbury*, 9 Gray, 451, 494; *Keyser v. Coe*, 37 Conn. 597, 613; *Powers v. Larrabee*, 1 Wis. 200; *State v. Cameron*, 2 Chand. (Wis.) 172; *Hart v. Rogers*, 9 B. Mon. 418, 422; *United States v. Bevins*, 3 Wheat. 336, 386; *Montgomery v. Henry*, 1 Dall. 49; *Tyler v. People*, 8 Mich. 320; 7 Mich. 161; 11 Am. L. Rev. 625. In this article in the *American Law Review* by Hon. Dwight Foster, it is said with reference to a *nisi prius* case tried in the Superior Court of Massachusetts in Barnstable County: "In the course of the trial, the presiding judge remarked: 'If the jurisdiction of the State extends to the distance of a marine league from the shore, as I

suppose it does, it does not follow, as a matter of course, that the jurisdiction of the county of Barnstable extends to that distance. I do not find any authority to that effect.' This *nisi prius* ruling was made by one of the ablest men of his day (Charles Allen of Worcester), who shortly after declined the place of Chief Justice of Massachusetts, upon the resignation of Shaw, C. J. But we refer to it, chiefly because it led to the immediate passage of the Massachusetts statute cited above." In the *King v. 49 Casks of Brandy*, 3 Hagg. Adm. 275, 290, Sir John Nicholl said: "No person ever heard of a land jurisdiction of the body of a county which extended to three miles from the coast." In Maine, it is held that every part of the State is within some one of its counties. *State v. Wagner*, 61 Maine, 178.

² 52 Ill. 373, 380.

³ See *Gammell v. Commissioners of Woods and Forests*, 3 Macq. 149; *Dunham v. Lamphere*, 3 Gray, 268; *Schultes, Aquatic Rights*, 3; *Chitty on the Prerogative*, 100; *Vattel*, tit. 1, c. 23; *Puffendorf*, IV. 4; VII. 8; *Craig, Jus Feud. lib. 1, 15, § 13*; *Lawrence's Wheaton's Int. Law*, pt. II. c. 4;

§ 14. All political bodies are not limited by the lines which bound their sub-divisions.¹ Counties are made up of towns, cities, or parishes, and yet the seashore between high and low-water mark, though within the county at low tide,² is presumed to be extra-parochial with respect to jurisdiction.³ This presumption applies to the shore of an arm of the sea⁴ and of a tidal river⁵ as well as to the shore of the external coast.

§ 15. In *Regina v. Keyn*, Kelly, C. B., and Sir R. Phillimore doubted whether Parliament could, consistently with a due regard to the rights of other nations and the principles of international law, create a general jurisdiction over the three-mile belt. It appears, however, to admit of little doubt that there is no legal restraint upon the legislature to assert and exercise such power.⁶ The subject was discussed in Parliament shortly after the above decision, and a statute was enacted by which foreigners passing in foreign vessels, within three miles of the shore, were made subject to the criminal law of England.⁷ This statute appears to extend the jurisdiction only.

Martens, *Precis du Droit*, § 153; Hall's *International Law*, 125. In the recent English work by Coulson and Forbes on *Waters* (pp. 2, 4, 11) it said that a nation may bind itself by treaty, and perhaps by non-user, from participating in the common right of fishing at certain places in the sea in favor of other nations; and that "there can be no doubt but that by treaty, or by the implied assent of nations, the right of fishing within three miles of the coast of the United Kingdom is vested exclusively in the inhabitants subjects of her Majesty."

¹ *Embleton v. Brown*, 3 El. & El. 234; *Regina v. Musson*, 8 El. & Bk. 900; *ante*, § 13.

² *Regina v. Musson*, 8 El. & Bk. 900; *Waterloo Bridge Co. v. Cull*, 28 L. J. Q. B. 75; 5 Jur. 1288. See Hale, *De Jure Maris*, c. 6, 1; *Calmady v. Rowe*, 6 C. B. 880; *Regina v. Gee*, 1

El. & El. 1068; *McCannon v. Sinclair*, 2 Ib. 53; *Perrott v. Bryant*, 2 Y. & C. 61, 69; 31 & 32 Vict. c. 122, § 27; *Blackpool Pier Co. v. Fylde Union*, 46 L. J. M. C. 189; 36 L. T. 251; *Reg. v. Newport*, 31 L. J. M. C. 267.

³ *Ipswich Dock Commissioners v. St. Peter*, 7 B. & S. 310.

⁴ *Bridgewater Trustees v. Bootle-cum-Linacre*, L. R. 2 Q. B. 4; 7 B. & S. 348; *Cory v. Bristow*, 2 App. Cas. H. L. 262. *Rex v. Landulph*, 1 Mod. & Rob. 393, seems to apply to parishes bordering on private streams.

⁵ *Post*, c. 3.

⁶ See *Regina v. Keyn*, 2 Ex. D. 63.

⁷ 41 & 42 Vict. c. 73, entitled *The Territorial Waters Act*. In the House of Lords, the Lord Chancellor (Lord Cairns), in discussing the proposed legislation, said: "The jurisdiction to which he had to call attention was

§ 16. The effect of legislation relating to territorial waters has also been brought in question. In *Regina v. Keyn*,¹ the

not over rivers, bays, or harbours, because in respect of that no controversy had ever arisen, but the jurisdiction over the territorial waters in that belt or zone of the high seas which more or less surrounded the shores of the empire. This, at first sight, would appear to be a question of law. No doubt it was a question of law, but he rather thought of that which had been described as the first law of nature—the law of self-preservation. It was necessary, to some extent and in some measure, that there should be a territorial jurisdiction over the high seas surrounding the seaboard. No empire which had a seaboard could be allowed to remain without a jurisdiction of that kind. If in the case of such an empire it was held that the jurisdiction of the kingdom ended with the dry land, the consequence would be that the subjects of that kingdom in the presence of foreigners would be absolutely without defence from the moment they entered the sea for the purpose of bathing, or fishing, or for any other purpose. Not only so, but when on dry land they would be without a protection, because if no jurisdiction from the land extended to the sea surrounding the seaboard, people from all parts of the world might come to the part of the high sea contiguous to the land and resort to practices which might be of the most serious character to people on shore. So, again, in the case of war, hostilities carried on by belligerents outside the shore might expose a neutral power to the greatest danger. It might be asked whether the question was not solved, so far, at all events, as to the low-water mark to which unquestionably the territorial jurisdiction extended. With regard to the low-

water mark, it must be remembered that there were parts of the coasts where there were considerable intervals between high and low-water marks, and also there were in the kingdom, as their lordships knew, many places where the sea came so close to the cliffs that there was absolutely no horizontal interval between high and low-water mark. It had been suggested, or might be suggested, that if the jurisdiction of this country extended over the part of the high seas immediately adjoining the shore, inasmuch as the right of passage over that part was allowed to foreign ships, it would be unfair to claim such jurisdiction as against them. He was quite willing to concede the right of passage contended for, but he had imagined that it was to be conceded on this footing and this footing only—that those who availed themselves of the rights of passage should not expose themselves to any complaint of a violation of the rights of those by whom the right of passage was conceded. In truth, any such exemption would apply to the case of foreign ships coming into one of our bays.” With respect to the decision in *Regina v. Keyn*, the Lord Chancellor said: “One of the learned judges, for whom they all had the greatest respect, and whose judgment, from his experience in criminal cases, was of the greatest weight—Mr. Justice Lush—stated that though he concurred with the Lord Chief Justice in that learned judge’s view of the case, yet he wished to guard himself in this particular case with respect to the limits of the high seas.” He then quoted the passage in the opinion of Lush, J., in which that judge declined to adopt any expressions implying a doubt as to the competency of Par-

¹ 2 Ex. D. 63.

provision of the Merchant Shipping Act,¹ authorizing the detention of a foreign vessel which had caused injury to the

liament to legislate for these waters, and proceeded: "As he understood these words, if Sir Robert Lush had found that in the particular place Parliament had stepped in and said that portion of the water was part of the United Kingdom, he would have been of opinion that the Crown had territorial jurisdiction over it, and the conviction ought not to be quashed. It was fortunate for the prisoner in the 'Franconia' case, though not fortunate for the vindication of the law, that Mr. Justice Lush was under the impression that that had not been done which really had been done. It appeared that in an Act of 1848 for the regulation of customs there was a provision authorizing the Lords of the Treasury to establish ports in many places where ports were required, and to define their limits. Under that provision the Lords of the Treasury issued a warrant, which was inserted in the London Gazette of the 3rd of March, 1848. In that warrant were these paragraphs: 'That the limits of the port of Dover shall commence at St. Margaret's Bay aforesaid, and continue along the said coast of Kent to Cape Point in the said county. That the limits of the port of Folkestone shall commence at Cape Point aforesaid, and continue along the coast to Dungeness, in the said county.' 'And we, the said Commissioners of Her Majesty's Treasury, do further declare that the limits seaward of the said ports shall extend to a distance of three miles from low-water mark, out to sea, and that the limits of such ports shall include all islands, bays, harbours, rivers, and creeks within the same respectively.' So that under Parliamentary powers the proper authorities had declared, long before the 'Franconia' case, that the limits of

the Port of Dover extended three miles out to sea. He understood the view of the majority of the judges to be this, there was one jurisdiction by land and the other by sea; that the jurisdiction by land was one limited by the limits of counties, taking into the county the low-water mark, and the harbours and rivers within the county; and the jurisdiction by sea, the old jurisdiction of the Lord High Admiral now exercised by the Central Criminal Court; that the jurisdiction of the Lord High Admiral extended to the high seas, but the persons over whom it was exercised must be British subjects, not foreigners; and that the Central Criminal Court had no jurisdiction over the persons of foreigners beyond the low-water mark. That he understood to be the common ground on which the majority of the judges acted in quashing the conviction. And taking that as the *ratio decidendi* of the judges in a decision which he accepted, it would at first sight appear that there was nothing more for him to do than to ask the favorable consideration of their lordships for a Bill to amend the law; but there fell some observations from Sir Robert Phillimore, the Lord Chief Baron, and the Lord Chief Justice, whose judgment was the most elaborate, and might be regarded as the leading judgment of the majority, and which contained a principle that seemed to challenge the right of Parliament to legislate on this subject. Expressions of the Lord Chief Justice would certainly seem to imply that we could not legislate with respect to the high seas even within the limits of the belt or zone to which he had referred without the consent of foreign nations, or until after communication with foreign

¹ 17 & 18 Vict. c. 104, § 527.

property of English subjects in any part of the world, if at any time thereafter such ship was found in any port or river of the United Kingdom, or within three miles of the coast, was considered insufficient to include the three-mile belt within the realm, and Cockburn, C. J., doubted whether it would apply to a ship on a foreign voyage. In 1794, Congress recognized the three-mile rule by authorizing the district courts to take cognizance of complaints in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.¹ In the case of the *Brig Ann*,² a seizure was made off Newburyport, and within three miles of the shore, for violation of the embargo acts. Story, J., held that, as a principle of public law, the waters within the three-mile belt form part of the nation's territory;³ and that, as the acts in question extended to all places within the jurisdiction of the United States, these waters, as well as ports and rivers, were within the operation of the statutes. In *Dunham v. Lamphere*,⁴ Shaw, C. J., expressed the opinion that, by virtue of a statute of Massachusetts, which prohibited fishing with a seine within one mile of the shores of Nantucket and other small islands, that extent of sea was within the territorial limits of the State. It is now provided by statute, in this and other

nations. This was a very serious question. If the judgments of those learned judges amounted, as they were supposed to do, to a proposition of that kind, of course Parliament would be exceeding its powers if it entered into legislation applying to that belt or zone with the view of making foreigners answerable to our law. But he would ask their lordships to consider whether there was any foundation for that principle. He ventured to think there was not, and he thought it would be a very serious thing if there were." *London Times*, Feb. 15, 1878, reprinted in 2 *Halleck's Int. Law* (Baker's ed.), 559. *Blackpool Pier v. Fylde*, 46 L. J. M. C. 189. On March 30, 1882, in reply

to a question in reference to the projected channel tunnel, in the House of Commons, Mr. Joseph Chamberlain, president of the Board of Trade, said that the chairman of the South-eastern Railway had been warned that the government claimed the bed of the sea for three miles below low-water mark, and held themselves free to use any powers at their disposal as Parliament may direct, or the national interest may require.

¹ 1 Stats. at Large, p. 384, c. 50, § 6; 1 Kent Com. 26-30.

² 1 Gall. 62.

³ Citing *Church v. Hubbard*, 1 Cranch, 187, 234.

⁴ *Dunham v. Lamphere*, 3 Gray, 268, 269.

States, that the territorial limits of the State extend three miles seaward from the shore.¹

§ 17. The rights of the Crown in tide waters are classed among the *regalia* or prerogative rights, like the right to treasure trove, to wreck, and the privilege of appointing ports and havens. Such privileges are accorded to the king by the common law, as incident to the powers of government, for the protection of the realm, the regulation of the marine revenues, and in the interest of commerce.² Accord-

¹ In Massachusetts, "the territorial limits of this commonwealth extend one marine league from its seashore at low-water mark"; "the boundaries of counties bordering on the sea extend to the line of the State as above defined"; and "the sovereignty and jurisdiction of the commonwealth extend to all places within the boundaries thereof." St. 1859, c. 289; Gen. Sts. (1860) c. 1, §§ 1, 2. And the boundaries of cities and towns bordering upon the sea extend to the State line. St. 1881, c. 196. In Rhode Island there is a similar statute, the line being, however, one league from the seashore at *high-water* mark. Gen. Sts. (1872), c. 1, §§ 1, 2. See Rev. Sts. of R. I. (1857), c. 7, 8. In the Constitution of California, Art. 12, the State is bounded on the south along the boundary line between the United States and Mexico "to the Pacific Ocean, and extending therein three English miles"; and in the Political Code of that State it is provided, with respect to county boundaries (Sec. 3907), that "the words 'in,' 'to,' or 'from' the ocean shore mean a point three miles from shore. The words 'along,' 'with,' 'by,' or 'on' the ocean shore, mean a line parallel with and three miles from the shore." Thus the boundary of Del Norte County, which is the northerly sea-coast county of that State, begins at a point in the Pacific Ocean, at the southern

line of Oregon, and runs "thence southerly *by ocean shore*," &c. Code, § 3909. As to the statutes of New York, see *Mahler v. Norwich Transportation Co.*, 35 N. Y. 352, 360. See, also, Constitution of Alabama, Art. 2, § 1, and Code 1876, § 12 (16). The Republic of Texas defined its southern boundary as extending from "the mouth of the Sabine River and running west along the Gulf of Mexico, *three leagues* from land to the mouth of the Rio Grande," and after the annexation of Texas, the State reaffirmed this right of jurisdiction. In *Galveston v. Menard*, 23 Texas, 349, 391, it is said that the admission of this claim by other nations might depend upon the power of the littoral state to enforce it, but that the boundary thus established was conclusive between its own citizens with respect to the right of soil. By the treaty between the United States and Mexico (9 St. at Large, 926, § 5), it was provided that the boundary line between the two countries should commence in the Gulf of Mexico three leagues from land opposite the mouth of the Rio Grande River, and run northward with the middle of the river. See *The Peterhoff*, 5 Wall. 28, 51.

² 1 Black. Com. 263; 264; 2 Id. 14, 105, 204; Selden, *Mare Clausum*, lib. 2, c. 22, 24; Callis on Sewers, 39-41; Chitty's *Prerogative of the Crown*, 142, 173, 206; Com. Dig. tit. Pre-

ing to the treatise *De Jure Maris*, commonly ascribed to Lord Hale, and other authorities of the seventeenth century, which refer to early precedents, the Crown's interest in navigable waters is of a two-fold nature: first, the *jus publicum*, a right of jurisdiction and control for the benefit of its subjects, which is similar to the jurisdiction over public highways by land, though the right of soil may be in the owners of the adjoining estates, and for the protection of which the king, as the head of the realm, may interpose when the rights of the public are impaired;¹ second, the *jus privatum*, or right of private property, which is subject to the *jus publicum*, and which cannot be used by the Crown or conveyed to a subject discharged of this public trust, or so as to justify any interference with the public rights of navigation and

rogative D., and Navigation B.; Bacon's Abr. tit. Court of Admiralty A., and Prerogative B. 1, 3; 2 Roll. Abr. 168; Co. Litt. 1 b, 65 a; 3 Kent Com. 487; Woodward v. Fox, 2 Ventris, 267; Bracton, lib. 3, § 120; Hall on the Seashore (2d ed.), 6. "The king being to look to the sea as well as to the dry land, and being to defend his subjects both by sea and land, the law, therefore, gives him many prerogatives both upon the one and the other. As thus: (1) That the king, as supreme, is *custos totius regni Angliæ*, and to take care both of sea and land, of both which he, not only as to protection, but as to property, is said to be the lord. And therefore that the four seas, being as the walls of the kingdom, and havens, creeks, and ports adjoining to the sea, being the gates and posterns of it, are said by law to belong to him, and he is to name and appoint the officers for the custody thereof. . . . (4) That in cases where the sea-banks be broke or the sewers or gutters thereof not secured, the king might heretofore (by the common law) have appointed commissioners of sewers, and have given them commission to inquire of and to have punished the defaults,

and to have ordered the repairs of the passages, gutters, and rivers that lead into the sea. The which is now further provided for by the statutes of 23 Hen. 8, cap. 5, and 13 Eliz. cap. 9, and 1 Mar. cap. 11, with many others. (5) That the king may, upon special occasion, arrest ships within the seas for the voyages of the realm. (6) That he may by law, for his enablement and encouragement herein, and to help to maintain his navy, have and take divers privileges and advantages in, upon, and about the sea and rivers thereunto belonging. For (1) the soil, banks, and shores, as high as they flow and reflow, belong to him. (2) He is to have all the havens, ports, and creeks thereof. (3) He is to have all the navigable rivers and breaches of the sea, as Thames and Lee and the rest, which are his streams: and he hath, and is to have in them, the same prerogative, so high as the sea floweth and refloweth in them, as he hath *in alto mari*. And therein the fishing, *rigore juris*, as a royal fishery, doth belong to him." Shepperd's Abridg. (2d ed.), tit. Prerogative, pt. 3, p. 97.

¹ Hale, *De Jure Maris*, c. 6; Hargrave, 36.

fishery. In the case of *Attorney General v. London*,¹ Sergeant Merewether presented an elaborate argument,² in which he contended that, upon an examination of the early authorities, including the Saxon charters and laws, Domesday book, in which the king's lands are enumerated, the works of Bracton, Glanville, Fleta, and Britton, and the ancient decisions, no trace of a private interest in the Crown was found, but that, on the contrary, there were traces of a territorial right to the shores of tide waters as belonging to the adjacent lands; that the treatise *De Jure Maris*, which had been accepted as the repository of ancient learning upon this and kindred subjects, was not with good reason ascribed to Lord Hale, the use of whose name had given an undue weight to the statements there made;³ that the theory of a *jus privatum* had its rise in the arbitrary reigns of the Stuarts, from which period precedents for such a doctrine should be taken with caution; and that, while the Crown had confessedly certain rights in the sea and its shores, including dominion and jurisdiction over them by its courts, and the duty to care for them in the interests of navigation and for the public benefit, the proposition that it had also a private and beneficial interest, and a right to take the fruits of the seashore, independently of any title to the adjoining lands, had been asserted rather than controverted and adjudged.

§ 18. The case in which this argument was delivered appears to have been decided upon other grounds, and the later English decisions support the title of the Crown in accordance with the statements of the treatise *De Jure*

¹ Probably reported in 8 Beav. 270; 12 Beav. 8; 2 Mac. & G. 247; 1 H. L. Cas. 440.

² Published in the Appendix to Hall on the Seashore (2d ed.). See Jerwood on the Seashore, which contains a reply to this argument.

³ Certain of the ancient charters contained express grants of the sea-

shore, salt marshes, etc., accompanying the grant of the lands included in the charters. Thus Hale refers to a grant of King Canute "de terra insulæ Thanet, tam in terra quam in mari et littore"; and to another of William the First, "de tota terra Estanore, et totum littus usque medietatem aquæ." *De Jure Maris*, c. 5.

Maris.¹ It seems to admit of little doubt that this celebrated treatise was written by Sir Matthew Hale, and it is uniformly ascribed to him in the decisions of the English and American courts.² But the reported cases, which came before the English courts in the seventeenth century, tend to show that the doctrine was not then fully recognized;³

¹ In *Lord Advocate v. Blantyre*, 4 App. Cas. 770, 773, note, Lord Curriehill, Lord Ordinary, said in the court below: "There is no longer any doubt, if such ever existed, that the foreshore of the sea and of navigable rivers, though belonging to the Crown, subject to certain public uses connected with navigation and the like, are nevertheless alienable by the Crown subject to such public uses." In *Gann v. Whitstable Free Fishers*, 11 C. B. N. S. 387, Erle, C. J., said that there is no rule of law which prevents the Crown from granting to a subject that which is vested in itself.

² See *Regina v. Betts*, 4 Cox, C. C. 213; *Attorney General v. Chambers*, 4 De Gex & J. 55, 71; *Calmady v. Rowe*, 6 Man. G. & S. 878, note; *Exeter v. Warren*, 5 Q. B. 773, 801; *Ipswich Dock v. St. Peter*, 7 B. & S. 310, 344; *King v. Ward*, 4 Ad. & El. 384, 406; *King v. Yarborough*, 3 B. & C. 91; 2 Bligh, N. S. 147; 1 Dow, N. S. 176; *Bolt v. Stennett*, 8 T. R. 606; *Aldnutt v. Inglis*, 12 East, 527, 537; *Attorney General v. St. Aubyn*, *Wightwick*, 262; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Blundell v. Catterall*, 5 B. & Ald. 268; *Ex parte Jennings*, 6 Cowen, 536, note; *Per Waite*, C. J., and Field, J., in *Munn v. Illinois*, 94 U. S. 113, 126, 149; *Per Gray*, J., in *Nichols v. Boston*, 98 Mass. 39, 41, and *Haskell v. New Bedford*, 108 Mass. 208, 215; *Berry v. Snyder*, 3 Bush, 266, 275; *Phear's Rights of Water*, 47, note *m*; *Jerwood on the Seashore*, 31, 94, 118. Lord Hale's views appear in his judgment as Chief Justice in *Lord Fitzwalter's Case*, 3 Keb. 242; 1 Mod. 105 (s. c. 3 Keb.

459, 465, 485, 519, 555; 2 Lev. 139; 1 Freem. 414), and by his position as counsel in *Johnson v. Barrett*, Aleyn, 10, referred to in the next note. Sir Matthew Hale died in 1676, and the treatise *De Jure Maris*, though probably written in the earlier part of the seventeenth century, was not published until 1787.

³ Merewether argues that the *jus privatum* was not acknowledged in the English law prior to the case of *Bulstrode v. Hall*, Sid. 182, decided in 1663. He refers particularly to *Johnson v. Barrett*, Aleyn, 10 (1646). This was an action of trespass for carrying away soil and timber, in which it appeared that the bailiff and burgesses of Yarmouth had destroyed a wharf erected in that town. Rolfe, the presiding justice, stated that if it were erected between the high and low-water mark it belonged to the owner of the adjoining land, while Hale, who was counsel in the case, earnestly affirmed that it belonged to the Crown of common right. But it was clearly agreed that if it were erected beneath the low-water mark, it belonged to the king. Merewether argues that Hale would have cited this case in which he was counsel, if he were the author of the treatise *De Jure Maris*, or that, the case not being referred to in that treatise, it was decided against his doctrine. Woolrych (on *Waters*, 20) says of this case that "if it were understood that the soil between high and low-water mark might belong to a subject by grant or prescription, as might well be the fact, and that the soil below low-water mark belonged to the Crown, as being of little or no

and, as the American colonies were settled from England at that time, those cases and the argument of Sergeant Mewether appear to have a significance in this country, where, as will be hereafter seen, the ancient usages of most of the original States allow to the owners of the adjoining lands rights in the soil below the high-water mark of tide waters, which are unknown to the common law of England, and where, in accordance with the *dicta* of the earlier English decisions,¹ the view generally accepted has been that the Crown holds this property solely as a trustee for the public, and cannot, since Magna Charta, convey it to a subject.²

§ 19. Various reasons are assigned for the existence of a *jus privatum* in the Crown. Under the fiction of the feudal

value as the subject of a grant, there would be no difficulty in reconciling the opinions of the great lawyers who differed upon that occasion." It appears that the plaintiff afterwards had judgment. 2 Rol. Abr. 250, pl. 7. See *Boston v. Richardson*, 105 Mass. 351, 362; *Barnstable v. Thacher*, 3 Met. 239, 243; *Jerwood on the Seashore*, 61. In *Anon. Dyer*, 326 b (15 & 16 Eliz.) it was doubted whether the king was entitled to land left by the sea; and in *Attorney General v. Farmen*, 2 Lev. 171, it was debated whether such land belongs to the Crown as a thing of inheritance or of prerogative, and it was held that no patent could be made of the soil under the sea until it has become convertible or derelict. See, also, *Attorney General v. Turner*, 2 Mod. 104; 2 Lev. 171; *Whitaker v. Wise*, 2 Keb. 759. Lilly, who, although not a writer of high authority, perhaps shows the popular understanding prior to the publication of the *De Jure Maris*, says: "Lands between the high-water and low-water mark belong to the lord of the manor next adjoining, as part of his manor; and he can claim by prescription to have wreck and fishing there." 2 Lilly's Practical Register, tit. Rights.

¹ *Blundell v. Catterall*, 5 B. & Ald.

268; *Somerset v. Fogwell*, 5 B. & C. 875, 884; *Attorney General v. Farmen*, 2 Lev. 171; *T. Raym.* 241; 2 Mod. 106.

² *Per Kirkpatrick, C. J.*, in *Arnold v. Mundy*, 1 Halst. 1, 12, 77, 78; *Nevins, J.*, in *Bell v. Gough*, 23 N. J. L. 624, 684, 688; *per Bellows, J.*, in *Clement v. Burns*, 43 N. H. 609, 616; *Martin v. Waddell*, 16 Peters, 367, 410; *Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471; *Barney v. Keokuk*, 94 N. S. 324; *Commonwealth v. Wright*, 3 Am. Jur. 185; *Hatfield v. Grimstead*, 7 Ired. 139; *Galveston v. Menard*, 23 Texas, 349; *Chapman v. Kimball*, 9 Conn. 38; *McManus v. Carmichael*, 3 Iowa, 1, 29. In *Barker v. Bates*, 13 Pick. 255, 259, *Shaw, C. J.*, speaking of the law of England, said: "There the rule is that the right of property to high-water mark is in the Crown, but it is deemed to be so held in trust for the use and benefit of all the king's subjects, and therefore such right of property cannot be granted by the crown to a subject." See the opinions of the same judge in *Commonwealth v. Alger*, 7 Cush. 53, '89-94; *Weston v. Sampson*, 8 Cush. 347, 352; *Commonwealth v. Roxbury*, 9 Gray, 451, 483.

law, by which all lands in the kingdom were derived from the king as lord paramount, and held by his bounty, the shores and bed of tide waters, having no other acknowledged owner, are said to remain vested in him in all cases where he has not expressly granted them away.¹ One writer suggests that at the time of the Norman Conquest, William I., having acquired by confiscation all the estates in England, retained in his own seizin those lands, including the shore, which were not distributed among his followers.² The Crown's right of private property in tide waters within the realm formed part of the theory of its dominion upon the sea. Lord Hale³ considers the king's ownership of the shore to be one of the evidences of his ownership of the sea, and Callis says⁴ that the *littus maris*, or shore, taketh its name wholly from the sea, as partaking most of its nature, and that, in point of property and ownership, it is the king's as lord of the seas. Blackstone assigns to the king, as lord of the sea, the lands which it leaves when it suddenly recedes.⁵ So it is said that navigable rivers, so far as the tide ebbs and flows in them, belong

¹ In *Commonwealth v. Alger*, 7 Cush. 53, 90, Shaw, C. J., said: "By the general rule of the common law, all real property capable of use and possession, and having no other acknowledged owner, is, in theory, vested in the king, as the head and sovereign representative of the nation. The sea-shore," &c., "are deemed vested in and held by the king." In a recent case in Rhode Island, Potter, J., said: "It was the policy of the English law, and especially of the feudal system, to consider the king as the original owner of all the lands in the kingdom. Hence he was the owner of all vacant lands, derelict, &c. All was held of him and escheated to him. So he is spoken of as the owner of the shore." *Providence Steam-Engine Co. v. Providence Steamship Co.*, 12 R. I. 348, 358. In *Attorney General v. Chambers*, 4 De Gex, M. & G. 206, Ld. Ch. Cranworth said: "The principle which gives the shore to the

Crown is that it is land not capable of ordinary cultivation or occupation, and so in the nature of unappropriated soil. Lord Hale gives, as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are for the most part dry and manoriable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is, for the most part, not dry or manoriable."

² Jerwood on the Seashore, 20-29.

³ *De Jure Maris*, c. 4.

⁴ Callis on Sewers, 54. If the kings of England possessed the sea, "it follows that they possessed the shore as well as the sea, for if they have owned the sea, they have it at high water as well as low." Jerwood on the Seashore, 19, 20.

⁵ 2 Black. Com. 261.

to the king,¹ because they partake of the nature of the sea, which is his proper inheritance, and that he hath the same property in them as *in alto mare*.² The doctrine of the Crown's title as universal occupant appears to be at variance with a recent decision in the House of Lords. In that case³ the

¹ Hale, De Jure Maris, c. 4. "The king hath not only a dominion at sea, but he is '*dominus maris Anglicani*'; he is both owner of the sea and of the soil under the sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the barons of the Exchequer, in the case of Sutton Marsh (Mich. 13 Car.), that the soil of the land, so far as the sea floweth, is the king's, and the king is seized thereof, *jure coronae*." ³ Howell's State Trials, 1023. See also the passage from Shepperd's Grand Abr., ante, § 17, note.

² Royal Fishery of the Banne, Sir John Davies, 149; Com. Dig. tit. Prerogative, D. and Navigation, B.; 2 Roll. Abr. 170; Vin. Abr. 574, B. u. "If a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; for the English sea and channels belong to the king, and he hath the property in the soil, having never distributed them out among his subjects." Bacon's Abridg. tit. Court of Admiralty, A. and Prerogative, B. 3.

³ Bristow v. Cormican, 3 App. Cas. 641. The plaintiffs in this case had never been in actual possession, but, in support of their claim to a several fishery over the whole of the lake, introduced documentary evidence of title, commencing with a royal grant from Charles II. in 1660, and continued by leases and other documents. The defendants set up a claim of right in favor of and also user by the public. No evidence was given of the Crown's title. The judge at the trial withdrew the case from the jury and directed a verdict for the plaintiffs. The House of Lords

held this to be erroneous, the question being one of fact and not of law. Lord Blackburn said: "It is, however, necessary to decide whether the Crown has of common right a *prima facie* title to the soil of a lake. I think it has not. I know of no authority for saying it has, and I see no reason why it should have it. Mr. Justice Lawson, in his able opinion, hints at one. 'What ground,' he says (Ir. R. 10 C. L. 418), 'is there for suggesting that the title was not in the Crown? It is not shown, or even suggested, to be in any other, and it could not be in the public.'" This would be a strong remark if there was any authority for saying that, by the prerogative, the Crown was entitled to all lands to which no one else can show a title. But this is so far from being the case, that, in the only instance in which no one could show a title, I mean that of an estate granted to one for the life of another, where the grantee died leaving the *cestui que vie*, the law cast the freehold on the first occupant of the land. See Co. Litt. 40. It was never thought that the Crown was entitled in such a case. Those who committed trespasses after the death of the tenant for life, and before any one occupied, did so with impunity, because there was no one entitled to complain of their acts, and it may be that those who fish in Lough Neagh may do so, not of right, yet with impunity, so long as the true owner of the soil either fails to prove his right, or does not choose to interfere. But that does not give any rights to the Crown. The Crown might have had title in many ways, by forfeiture,

plaintiff proved, in support of his claim of title to a non-tidal lake, an ancient royal grant, but did not prove the title of the Crown; and although there was no suggestion that the title could be legally vested in any other than the Crown, it was held that it was necessary to prove the grantor's title, as in the case of a private grant, and that there was no presumption in favor of the Crown's title to vacant land like the bed of a lake. Such presumption exists with respect to the shore and the soil under tide waters;¹ and if the Crown's private rights in the bed of navigable waters within the realm were originally connected with the obsolete theory of dominion over the narrow seas, it is, perhaps, probable that they now depend upon prescription.²

§ 20. "All prerogatives," says Bacon,³ "must be for the advantage and good of the people; otherwise they ought not

or escheat, or otherwise. But generally speaking, in order to make such a title in the Crown perfect, there must be office found. And here not only is there no evidence of any office found, but the indenture contains what purports to be a dispensation from the Statute of Henry VI. showing that there was not any office found. I think, therefore, that Mr. Justice Fitzgerald was quite right when he says (Ir. R. 10 C. L. 422) that 'we must deal with the grants of 1660 and 1661 in the same way as if the grantor was a private individual.' See, however, *Doe v. Redfern*, 12 East, 96; 2 Black. Com. 258, 261; *Crane v. Reeder*, 21 Mich. 24.

¹ The right to the soil between high and low-water mark is *prima facie* in the Crown, and although it may be in a subject according to the terms of the grant, yet the burden is upon those who set up an adverse title. *Attorney General v. Richards*, 2 Anst. 606; *Scrutton v. Brown*, 4 B. & C. 485; *Somerset v. Fogwell*, 5 Id.; *Dickens v. Shaw*, reported in Hall on the Seashore, Appendix, p. 283; *Blun-*

dell v. Catterall, 5 B. & Ald. 268; *Attorney General v. Parmenter*, 10 Price, 378; s. c. *nom. Parmenter v. Gibbs*, Id. 412; *Attorney General v. Burridge*, Id. 350; *López v. Andrew*, 3 Man. & Ryl. 329; *Levett v. Wilson*, 3 Bing. 115; *post*, § 27.

² See Chitty on the Prerogative, 142, 206; Sheppard's Grand Abr. pt. 3, p. 46; 1 Molloy, De Jure Marimo (9th ed.), 125, 126. "Every government that is not established by military force, or founded on the express consent of the people, must derive its authority from positive law or from long-continued usage. . . No one will pretend that any prerogative of the king of England is founded either on military force or on the express consent of the people. Every prerogative of the Crown must, therefore, be derived from statute or from prescription; and, in either case, there must be a legal and established mode of exercising it." Allen on the Prerogative (1st ed.), 166.

³ Bac. Abr. tit. Prerogative, p. 1; Bracton, l. 2, c. 5, § 7; Id. l. 3, t. 1, c. 9; Hale, De Jure Maris, c. 2, pl. 3;

to be allowed by law." "Many of the king's rights," says Bayley, J.,¹ "are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing." So far as the use of tide waters is necessary for these purposes, the public are invested with rights which are as clearly established as those of the Crown, and its private right is burdened with a trust or charge in favor of the public. The king has the property, but the people have likewise the use necessary.² This has been compared to the waste of a manor,³ wherein the title is in the lord, but the common right of user is possessed by all the tenants, and to the king's highway, in which, though the title may be in the owners of the adjoining lands, yet the king, as guardian and protector of the public interests, has the power to prevent obstructions, and the people have the common right of passing and repassing.⁴ Certain incidental privileges necessary to the exercise of the public rights of navigation and fishery are allowed by law, which involve the use of the soil beneath the water as well as the water itself. The right of anchorage is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right,⁵ and if reasonably and properly exercised,⁶ it is protected like the principal right, though it involves a temporary disturbance of the soil, or an unavoidable injury to an oyster bed there planted.⁷ If a river is navigable, it is so whether the tide is in or out, and a vessel

Hargrave's Law Tracts, 11, 19, 20; Finch, L. 84, 85; Craig, *Jus Feudale*, l. 1; Schultes, *Aquatic Rights*, 1-5; *Rorke v. Dayrell*, 4 T. R. 402, 410.

¹ *Blundell v. Catterall*, 5 B. & Ald. 268.

² *Callis on Sewers*, 55.

³ Hale, *De Jure Maris*, c. 4, pl. 1.

⁴ Hale, *De Jure Maris*, c. 2, pl. 3, and c. 6; Hargrave's Law Tracts, p. 36; *Blundell v. Catterall*, 5 B. & Ald. 268.

⁵ *Gann v. Free Fishers of Whitstable*, 20 C. B. n.s. 1; *Colchester v.*

Brooke, 7 Q. B. 339; *Stephen v. Costor*, 2 Burr. 1408.

⁶ The right of passage is locally unlimited, and extends to every part of a navigable river as well as of the sea; *Rex v. Ward*, 4 Atk. 384; *post*, § 55; but the right to anchor is confined to such places as are usual and reasonable, having regard to the condition of the particular place. *Williams v. Wilcox*, 8 Ad. & El. 314; *Rose v. Miles*, 4 M. & S. 101; *Colchester v. Brooke*, 7 Q. B. 339; *post*, § 96.

⁷ *Ibid*.

which cannot reach its destination in a single tide may remain aground till the tide serves.¹ So the right to take shell-fish below high-water mark, as well those which are imbedded in the soil as those which lie upon its surface, is a part of the public right of fishery, and, in the exercise of this right, the public may dig or rake the soil.²

§ 21. The Crown may grant to a subject the soil of tide waters, and in ancient times it could pass exclusive rights of fishery in such waters.³ According to Lord Hale, the shore

¹ *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Hall on the Seashore* (2d ed.), 43, note. A vessel thus grounded is not a nuisance, and another vessel will not be justified in running into it negligently or maliciously. *Id. Cummins v. Spruance*, 4 Harr. (Del.) 315.

² *Bagott v. Orr*, 2 Bos. & Pul. 472; *Blundell v. Catterall*, 5 B. & Ald. 268, 269; *Hall v. Whillis*, 14 Sc. Ct. of Ses. (2d series), 324; *Martin v. Waddell*, 16 Peters, 410; *Den v. Jersey City*, 15 How. 132; *McCready v. Virginia*, 94 U. S. 391; *Fleet v. Hegeman*, 14 Wend. 42; *Paul v. Hazelton*, 37 N. J. L. 106; *State v. Taylor*, 27 Id. 117; *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255; *Peck v. Lockwood*, 5 Day, 28; *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353; *Moulton v. Libbey*, 37 Maine, 472; *Porter v. Shehan*, 7 Gray, 435. "The right of fishing in the sea or rivers in any town in this Commonwealth, either for swimming fish or for shell-fish, is a public right which belongs to all the inhabitants of the town, unless restricted by acts of the legislature or of the town, inconsistent therewith, or by prescription; and a grant by the legislature to a town of the title in the bed of a river, or in flats covered by tide water, within its limits, does not convey by implication the right of fishing to the town as its own property; for the right of fishing, not being an incident

to the right of property in the soil, but a public right to take the fish, which, whether moving in the water or imbedded in the mud covered by it, depend upon the water for their nourishment and existence, is unaffected by the question whether the title in the land under the water is in the Commonwealth, in the town, or in private persons." *Gray, J., in Proctor v. Wells*, 103 Mass. 216, citing *Coolidge v. Williams*, 4 Mass. 140; *Randolph v. Braintree*, *Id.* 315; *Dill v. Wareham*, 7 Met. 438; *Weston v. Sampson*, 8 Cush. 347; *Lakeman v. Burnham*, 7 Gray, 437; *Commonwealth v. Bailey*, 13 Allen, 541.

³ Weirs in navigable rivers are legal in England, if erected before the reign of Edward I. *Williams v. Wilcox*, 8 Ad. & El. 314; *Rex v. Westham*, 10 Mod. 159; *Rex v. Bristol Dock Co.*, 6 B. & C. 181; *Lord Fitzwalter's Case*, 1 Mod. 105; *Carter v. Murcot*, 4 Burr. 2162; *Anon.* 6 Mod. 73; *Rex v. Clark*, 12 Mod. 615; *Case of Chester Mill*, 10 Rep. 137; *Robson v. Robinson*, 3 Dougl. 307; *Warren v. Matthews*, 1 Salk. 357; *Somerset v. Fogwell*, 5 B. & C. 875, 884; *Blundell v. Catterall*, 5 B. & Ald. 268; *Weld v. Hornby*, 7 East, 195; 2 Black. Com. 39; 16 Vin. Abr. tit. Piscary, B. 1; *Hale, De Jure Maris*, c. 5; *Hargrave's Law Tracts*, 85; *Phear*, 50; *Browne v. Kennedy*, 5 Har. & J. 203; *Weston v. Sampson*, 8 Cush. 347, 352;

between the high and low-water mark, "may be, and commonly is, parcel of the manor adjacent,¹ and a subject may possess the creeks or smaller arms of the sea, but not those portions of the sea which would require a naval armament for their defence against foreign powers.² It is incompetent for the Crown in modern times to abridge or destroy, by its own act, the public rights either of navigation or fishery, and it cannot confer upon its grantee a greater power in this respect than that with which it is itself invested.³ This subject was reviewed in certain cases in the Exchequer relating to Portsmouth Harbor. In *Attorney General v. Burrighe*,⁴ it

Bulbrook v. Goodere, 3 Burr. 1768; *Colchester v. Brooke*, 7 Q. B. 339; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Allen v. Donelly*, 5 Ir. C. L. 292; *O'Neill v. Allen*, 9 Id. 133; *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192; *Lord Advocate v. Hamilton*, 1 Macq. H. L. 47; *Seebkristo v. East India Co.*, 10 Moo. P. C. 140.

¹ Hale, *De Jure Maris*, c. 4, II. 3.

² *Ibid.* c. 6; *ante*, § 3, note. Mr. Hall (on the *Seashore*, 2d ed. 106) considers that the statute, 1 Anne, c. 7, § 5, by which royal grants of the demesnes and landed possessions of the Crown are prohibited, restrains the alienation of the seashore. See 1 Black. Com. 286; *Doe v. York*, 14 Q. B. 81. In England, the regulation and control of the seashores, &c., are now entrusted to commissioners under acts of Parliament. By 29 & 30 Vict. c. 62, § 7, the management of the Crown's interests in the shores and bed of the sea and the tidal rivers of the United Kingdom was transferred from the Commissioners of Woods and Forests to the Board of Trade, and the duties of the Board are, *inter alia*, to protect the Crown's rights, to ascertain in what parts of the coast the Crown has parted with its rights, in what parts the rights of the Crown are undoubted, and in what parts the title is doubtful; to prevent encroachments on the foreshore, to protect

navigation and other public interests, and to sell, lease, or license the use of and otherwise deal with the soil, when expedient so to do, under the powers contained in earlier statutes. See also 37 & 38 Vict. c. 40; Hall on the *Seashore* (2d ed.), 4, n.

³ *Ibid*; *Fitzpatrick v. Robinson*, 1 Hud. & Br. (Ir.) 585; *Devonshire v. Hodnett*, *Ibid.* 322; *Williams v. Wilcox*, 8 Ad. & El. 314; *Lord Advocate v. Sinclair*, L. R. 1 H. L. 174; *In re Hull v. Selby Railway Co.*, 5 M. & W. 327; Hale, *De Jure Maris*, c. 5, 6; 2 Roll. Abr. 107, 170; *Sir Henry Constable's Case*, 5 Rep. 107; *Dickens v. Shaw*, in Hall on the *Seashore* (2d ed.), App.; *Chad v. Tilsed*, 2 Brod. & B. 403; 5 Moore, 185; *Scratton v. Brown*, 4 B. & C. 485; *King v. Montague*, 4 B. & C. 598; *Beaufort v. Swansea*, 3 Exch. 413; *King v. Ward*, 4 Ad. & El. 384; *Warren v. Matthews*, 6 Mod. 73; *Grosvenor's Case*, 2 Starkie, 511; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192, 217; 11 C. B. n. s. 301; *Hastings v. Ival*, L. R. 19 Eq. 558; *Colchester v. Brooke*, 7 Q. B. 373; *Nichols v. Boston*, 98 Mass. 41; *Rogers v. Jones*, 1 Wend. 237; *Brookhaven v. Strong*, 60 N. Y. 56; *Furman v. New York*, 5 Sandf. 16; *Browne v. Kennedy*, 5 H. & J. 195; *Baltimore v. McKim*, 3 Bland Ch. 453; *Cascy v. Ingloes*, 1 Gill, 430.

⁴ 10 Price, 350. In England the

was held that while the Crown may grant a town or borough, which is *caput portus*, and all the land between high and low-water mark; yet the subject-matter of the grant remains subject to the right of the king and his people to pass and repass. Attorney General *v.* Parmenter¹ decides that where a part of the shore is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to that objection, if acted upon so as to work an injury to the public right, or it is a grant which does not divest the Crown or invest the grantee. In the earlier case of Attorney General *v.* Richards,² it appeared by the information that the defendants had built certain permanent structures in the harbor between high and low-water mark, which prevented vessels from passing over the spot or mooring there, and also endangered the navigation of the harbor by preventing the current of water from carrying off the mud. The defendants claimed under letters-patent from the Crown, which did not convey the soil at the place in question. There was held to be an invasion of both the *jus publicum* and the *jus privatum*, and the defendants were restrained from making further erections, and ordered to abate those already built. There is a broad distinction between a violation of the public right and an invasion of the proprietary interest of the Crown. The one creates a public nuisance; the other a purpresture. Any encroachment upon the king, either upon part of the demesne lands, or in public rivers, harbors, or highways, is called a purpresture.³ If a littoral

prerogative of the Crown to intervene, in actions affecting the rights or revenues of the sovereign, was not affected by the Judicature Acts; and in such matters the Exchequer Division of the High Court of Justice has all the powers formerly possessed by the Court of Exchequer. Attorney General *v.* Barker, L. R. 7 Ex. 177; Attorney General *v.* Constable, 4 Ex. D. 172.

¹ 10 Price, 378, 412.

² 2 Anst. 603.

³ 2 Inst. 38, 272; Co. Litt. 277 b; Spellman's Glossary, tit. Pourpresture;

2 Story Eq. Jur. § 921; 4 Black. Com. 167; Termes de la Ley, tit. Purpresture. "Purpresture in a forest is every encroachment upon the king's forest, be it by building, inclosing, or using of any liberty without a lawful warrant so to do." Ibid.; Glanville (Beames' ed.), 238. A bathing-house, erected on piles driven into the bed of a navigable river below low-water mark, such bed belonging to the government, is, as between individuals, personal property. Marcy *v.* Darling, 8 Pick. 283.

proprietor, without grant or license from the Crown, extends a wharf or building into the water in front of his land, it is a purpresture,¹ though the public rights of navigation and fishery may not be impaired.² If such a structure causes injury to the public right, it is a common nuisance and abatable as such, even though erected under license from the king, for he cannot license a common nuisance.³ It is not every building below the high-water mark, nor every building below the low-water mark, that is *ipso facto* a nuisance, but nuisance or not nuisance is a question of fact.⁴ The remedy for a purpresture is either by an information of intrusion at common law, or by information in equity at suit of the attorney general.⁵ The effect of a judgment at law is the abatement of the erection complained of, whether it be a nuisance or not.⁶ When the structure is both a purpresture and a nuisance, the injury to the rights of the king and of his subjects may be redressed in the same proceeding. A common nuisance is abatable at suit of the Crown by virtue of its power of superintendence and control, and the attorney general, on the part of the Crown, may proceed by information in equity for the protection either of the *jus privatum* of the king from the purpresture, or the *jus publi-*

¹ Hale, De Portibus Maris, c. 7; Q. B. 339; Rex v. Tindall, 1 N. & P. Hargrave's Law Tracts, 84; Callis on 723.
Sewers, 174, 175; Woolrych on
Waters, 193; 2 Story Eq. Jur. §§ 921
-925; Eden on Injunctions, 259;
Beames's Glanville, 239, note; 3 Kent
Com. 432.

² Ibid.; New Orleans v. United
States, 10 Peters, 623; Hart v. Mayor,
9 Wend. 571; Commonwealth v.
Wright, 3 Am. Jur. 185; Watertown
v. Cowen, 4 Paige, 510; Attorney
General v. Cohoes Co., 6 Paige, 133;
Mohawk Co. v. Railroad Co., Id. 554;
Davis v. Mayor, 14 N. Y. 526; People
v. Vanderbilt, 28 N. Y. 376.

³ Hale, De Portibus Maris, c. 7;
Hargrave's Law Tracts, 85; Gann v.
Whitstable Free Fishers, 11 H. L.
Cas. 192; Williams v. Wilcox, 8 Ad.
& El. 314; Colchester v. Brooke, 7

⁴ Hale, De Portibus Maris, c. 7;
Hargrave's Law Tracts, 85; Attorney
General v. Richards, 2 Anst. 603, 615;
Attorney General v. Burridge, 10
Price, 350; Reg. v. Betts, 16 Q. B.
1022; Reg. v. Randall, 2 Car. & M.
496; Attorney General v. Terry, L. R.
9 Ch. 423; Attorney General v.
Evart Booming Co., 34 Mich. 462;
People v. St. Louis, 5 Gilman, 351;
Diedrich v. North Western Railway
Co., 42 Wis. 248.

⁵ Eden on Injunctions, 223; 2 Story
Eq. Jur. § 922; 2 Dan. Ch. Prac.
(4th ed.), 1481; State v. Arledge, 1
Bailey (S. C.), 551.

⁶ Ibid.; Milford Eq. Pl. 145; At-
torney General v. Richards, 2 Anst.
606.

cum of his subjects from the nuisance.¹ The terms purpresture and nuisance are sometimes used interchangeably. But, in strictness, that which is simply a purpresture is not subject to indictment, although abatable by the Crown.² If the structure is both a purpresture and a nuisance, or if, being authorized by the Crown, it is a nuisance and not a purpresture, it is also liable to indictment,³ and to a private action in favor of individuals who sustain an injury distinct from that suffered by other members of the public.⁴ The mode of proceeding at common law to authorize the erection of wharves and other structures on the shores of the sea or of navigable rivers, where the property remained in the Crown, was to sue out a writ of *ad quod damnum*, and upon the return of an inquest by a jury, finding that no injury would result to the king or others from the grant, the Crown licensed what would otherwise be a purpresture.⁵ Although a royal grant or license would not protect from indictment or injunction,

¹ Attorney General *v.* Parmenter, 10 Price, 378, 412; Attorney General *v.* Burridge, Id. 350; Attorney General *v.* Chamberlaine, 4 K. & J. 292; Attorney General *v.* St. Aubyn, Wightw. 167; Attorney General *v.* Richards, 2 Anst. 603; Attorney General *v.* Johnson, 2 Wils. Ch. 87; Attorney General *v.* Philpot, cited 2 Anst. 607; Bristol Harbor Case, cited 18 Ves. 214; Attorney General *v.* Tomline, 12 Ch. D. 214; Attorney General *v.* Cleaver, 18 Ves. 218; Attorney General *v.* Forbes, 2 Myl. & Craig, 129; Bristol *v.* Morgan, and Newcastle *v.* Johnson, cited in Hale, *De Portibus Maris*, c. 6; Hargrave's Law Tracts, 81; 2 Story Eq. Jur. §§ 921-925; Cooper, Eq. Pl. 102; People *v.* Vanderbilt, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; Davis *v.* Mayor, 14 N. Y. 526; Mohawk Bridge Co. *v.* Utica Railroad Co., 6 Paige, 559; Hart *v.* Albany, 3 Paige, 559; Attorney General *v.* Cohoes Co., 6 Id. 133; People *v.* St. Louis, 5 Gilman, 351.

² Ibid.; 4 Black. Com. 271, note.

³ Rex *v.* Grovesnor, 2 Stark, 511;

Attorney General *v.* Richards, 2 Anst. 603; Newcastle *v.* Clark, 2 Moore, 666; Rex *v.* Clark, 12 Mod. 615; Rose *v.* Miles, 4 M. & S. 101.

⁴ *Post*, § 122.

⁵ Com. Dig. tit. *Ad quod damnum*; Rex *v.* Montague, 4 B. & C. 598; Rex *v.* Russell, 6 B. & C. 566; Commonwealth *v.* Alger, 7 Cush. 53, 82; Nicholls *v.* Boston, 98 Mass. 39, 41; Bell *v.* Gough, 23 N. J. L. 624, 661; Hendricks *v.* Johnson, 6 Porter, 572. The proceeding by inquisition under the writ of *ad quod damnum*, which was the common-law mode of taking private property for public use, is now quite generally superseded by the provisions in acts authorizing canals, dams, railroads, etc., for the condemnation of private property. If the act of incorporation is silent as to the mode of proceeding, or the nature of things requires it, the principles, applicable to proceedings under the writ of *ad quod damnum*, still govern. Compton *v.* Susquehanna Railroad, 3 Bland, 386.

as nuisances, buildings which impair the common right of navigation, yet Parliament has the power to determine whether this would be for the public advantage. It may legalize encroachments which are for the benefit of navigation,¹ and, it would seem, may also sanction such as are not in aid of the public right.²

§ 22. The general principle is that no time runs against the king;³ yet by custom or prescription a subject may acquire certain of the maritime interests of the Crown, including the right of several fishery in the creeks and arms of the sea, the property in the shore and in land left by the recession of the sea, and in wreck.⁴ Lord Hale says that the evidence to prove that the shore is parcel of a manor are commonly these: "Constant and usual fetching gravel and seaweed and sea-sand between the high-water and low-water mark, and licensing others so to do; inclosing and imbanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and

¹ *Lowe v. Govett*, 3 B. & Ad. 863; *Rex v. Montague*, 4 B. & C. 598; *Vooght v. Winch*, 2 B. & Ald. 662; *Attorney General v. Burridge*, 10 Price, 350; *Attorney General v. Parmenter*, 10 Price, 378, 412; *Williams v. Wilcox*, 8 Ad. & El. 314; *Rex v. Montague*, 4 B. & C. 598; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charlestown*, 1 Pick. 180, 185; *Weston v. Sampson*, 8 Cush. 347, 352; *Commonwealth v. Alger*, 7 Cush. 53, 83; *Nichols v. Boston*, 98 Mass. 39, 41; *People v. New York Ferry Co.*, 68 N. Y. 71; *Vanhorne v. Darrance*, 2 Dall. 304; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 230; *Scudder v. Trenton Falls Co.*, Sax. (N. J.) 696; *Gough v. Bell*, 22 N. J. L. 441, 457.

² *Ibid.* In this country, the powers of Congress and of the State legislatures are restrained by written constitutions, but acts of Parliament are valid, though they conflict with the unwritten constitution. 4 Co. Inst. 36;

1 Black. Com. 90, 160, 161, 244; Hale, Of Parliaments, 49; Locke on Government, p. 2, §§ 149, 227; Broom's Const. Law, 795; De Tocqueville, Democracy in America, c. 6; Hodgdon v. Little, 14 C. B. N. s. 111; 16 Id. 198; *Rolle v. Whyte*, L. R. 3 Q. B. 286, 306; *Edujlee Byramjee, Ex parte*, 5 Moo. P. C. 294; 3 Moo. Ind. App. 468; *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504, 516; *Thompson v. Andros-coggin Co.*, 54 N. H. 545, 556.

³ 3 Black. Com. 257; Broom's Legal Maxims, 165. No lapse of time will legalize a public nuisance, and the right to maintain encroachments which limit the public right cannot be gained by prescription. *Post*, § 121; *Peckman v. Henderson*, 27 Barb. 207.

⁴ Hale, De Jure Maris, c. 5, 6; Hargrave's Law Tracts, 18, 25, 27, 29, 31, 32; *Kingston v. Homer*, Cowper, 102, 215; *In re Belfast Dock*, 1 Ir. Rep. Eq. 128; *Re Alston's Estate*, 5 W. R. 189.

punishment of purprestures there in the court of a manor; and such like. And as it may be parcell of a manor, so it may be parcell of a vill or parish; and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like.”¹ He does not indicate how many of these evidences should combine in order to establish such title to the shore. It has been held that a prescriptive right to wreck will not alone confer such title as against the Crown.² It would, however, appear that long-continued enjoyment of the shore by taking shell-fish and gravel, or by letting it to tenants to take seaweed, may suffice to prove that it is part of the adjacent manor.³ Mr. Hall⁴ discusses this doctrine of prescription at length, and concludes that the shore, being land,⁵ must be governed by the rules of law which apply to inland estates; that a title to this, as well as other land, can only be established, by prescription against the Crown, by showing an adverse possession for sixty years, which is the period prescribed by the Statute of Limitations as to Crown lands; that such adverse possession must, as in the case of the dry land, be proved by showing occupation and actual possession, and that the taking of wreck and seaweed, and the exercise of similar privileges, which do not necessarily imply a title to the soil, because they may be possessed without it, cannot be evidence to establish an absolute ownership in the shore by prescription.

§ 23. Under a royal grant, no alienation will be presumed beyond what is clearly and indisputably expressed.⁶ But

¹ Hale, *De Jure Maris*, c. 7; Hargrave's *Law Tracts*, 27; As to parishes, see *Perrott v. Bryant*, 2 Y. & Col. 61.

² *Dickens v. Shaw*, reported in Hall on the *Seashore* (2d ed.), App. 45. See *Chad v. Tilsed*, 5 Moore, 185, 197; 2 Brod. & Bing. 403; *Calmady v. Rowe*, 6 C. B. 861, 891; *ante*, § 6.

³ See *Le Strange v. Rowe*, 4 F. & F. 1048; *Healy v. Thorne, Jr.* R. 4 C. L. 495.

⁴ Hall on the *Seashore* (2d ed.), 16-40, 217. See *Phear's Rights of Water*, 88.

⁵ *Scrutton v. Brown*, 4 B. & C. 485; *Chad v. Tilsed*, 2 Brod. & Bing. 403, 409; 5 Moore, 185; *Beaufort v. Swansea*, 3 Exch. 413.

⁶ *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset v. Fogwell*, 5 B. & C. 375; *Attorney General v. Farmen*, 2 Lev. 171; *post*, § 29.

where the subject possesses land adjoining the sea, the title to which was acquired under an ancient grant from the Crown, which does not by its terms clearly exclude the shore, modern usage is admissible to interpret the grant, and to establish a title to the soil between high and low-water mark as part of the adjoining lands.¹ Thus, modern acts of ownership may be admitted to show that ancient grants of King John and Edward I. included the sea-coast down to low-water mark;² to show whether the words "river L." in an ancient patent comprised the bed of the river down to a point where it reached the sea, or only to a certain ford some distance up the river,³ or to show that the seashore is parcel of a manor.⁴ In *Chad v. Tilsed*,⁵ it appeared that a grant of wreck was made by King Henry II., in connection with the grant of certain lands upon the coast, which was confirmed by Henry VIII. The proprietors had erected an embankment upon the shore forty years prior to the suit, and, though the bank had been broken by tempests, had since asserted, without opposition, an exclusive right to the soil thus enclosed. It was held that this exclusive occupation and usage constituted evidence from which a previous usage might be presumed, and that such usage, coupled with

¹ *Chad v. Tilsed*, 5 Moore, 185; 2 Brod. & Bing. 403; *Beaufort v. Swansea*, 3 Exch. 413; *Levett v. Wilson*, 3 Bing. 115; *Lopez v. Andrews*, 3 Man. & Ryl. 329; *Weld v. Hornby*, 7 East, 194, 199; *Attorney General v. Jones*, 2 H. & C. 347; *Calmady v. Rowe*, 6 C. B. 861; *Attorney General v. Chamberlaine*, 4 K. & J. 292; *Hastings v. Ivall*, L. R. 19 Eq. 558; *Attorney General v. Chambers*, 4 De Gex & J. 55; 4 De Gex, MacN. & G. 206; *Waterpark v. Fennell*, 7 H. L. Cas. 650; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Rogers v. Allen*, 1 Camp. 309; *Lee v. Brown*, 2 Mod. 69; *Bristow v. Cormican*, 3 App. Cas. 641; Ir. R. 10 C. L. 425; *Lord Advocate v. Blantyre*, 4 App. Cas. 770; *Newcastle Pilots v. Bradley*, 2 El. & B. 428, note; *Jenkins v. Harvey*, 1 C. M. &

R. 877; *Brine v. Thompson*, 4 Q. B. 543, 552; *In re Belfast Dock Act*, Ir. R. 1 Eq. 128; *Healy v. Thorne*, Ir. R. 4 C. L. 495; *Donegal v. Templemore*, 9 Ir. C. L. R. 374; *Brew v. Harren*, Ir. R. 11 C. L. 198; Ir. R. 9 C. L. 29; *Boyle v. Mulholland*, 10 Ir. C. L. R. 150; *Mulholland v. Killen*, Ir. R. 9 Eq. 471; *Bloomfield v. Johnson*, Ir. R. 8 C. L. 68, 91.

² *Beaufort v. Swansea*, 3 Exch. 413; *Attorney General v. Jones*, 2 H. & C. 347; *Le Strange v. Rowe*, 4 F. & F. 1048; *Hunt on Boundaries* (2d ed.), 225.

³ *Donegal v. Templemore*, 9 Ir. Com. Law, 374; *In re Belfast Dock*, 1 Ir. Eq. 128.

⁴ *Calmady v. Rowe*, 6 C. B. 861.

⁵ 5 Moore, 185; 2 Brod. & Bing. 403.

the general terms of the grant, served to elucidate it and to establish the asserted right to the shore. Dallas, C. J., said:¹ "I agree that cases of this sort may rest on one or both of the two following grounds: That is to say, on grant, or on usage which presupposes a grant; I agree, also, that in the case of a grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage; but it is equally clear that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence whence usage anterior to that time may be presumed; and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant." In the recent case of *Hastings v. Ivall*,² the town of Hastings sought to restrain the defendant by injunction from depositing earth upon a portion of the shores within its limits. Letters patent from Queen Elizabeth to the corporation were produced, which granted certain lands in and about Hastings, and "all that her parcel of land and her hereditaments called the Stone Beache, with the appurtenances in Hastings aforesaid, in the said county of Sussex, and all messuages, houses, edifices, and buildings whatsoever, with the appurtenances, in and upon the aforesaid parcel of land called the Stone Beache." It appeared that the corporation had exercised acts of ownership over the beach; that these acts had on several occasions been recognized by the Crown, but that there had been certain acts on the part of the corporation tending to show admissions of the title of the Crown to certain parts of the beach. The power of the Crown to grant the shore in the reign of Elizabeth was not doubted, and as the term "Stone Beach" was now applied to the soil below, as well as above, high-water mark, the corporation was held to have a sufficient possessory title to the space between high and low-water mark to enable it to maintain the suit against a mere trespasser, even though the

¹ 2 Brod. & Bing. p. 406.

² L. R. 19 Eq. 558.

evidence might not be sufficient to displace the *prima facie* title of the Crown. In this country, also, ancient patents, or grants from the government, in which the description of the land is vague, may be interpreted by the acts of the government, of the parties, and of those claiming under similar grants of the contiguous lands.¹ So, also, ancient deeds and plans may be introduced in evidence to show the position of a creek or arm of the sea which has been filled up since they were made.²

§ 24. In strictness, the *jus publicum* is limited to the rights of navigation and fishery, and to the incidental rights above referred to.³ In the case of *Bagott v. Orr*,⁴ in which the *prima facie* right of every subject to take shell-fish found upon the sea beach between high and low-water mark was recognized, the court declined to express an opinion as to the subject's right to take *shells*, saying that, as no authority was cited in support of it, they should pause before establishing a general right of that kind.⁵ In *Porter v. Shehan*,⁶ in Massachusetts, it was held, with respect to unenclosed flats, which were private property, subject to the right of the public to take floating and shell-fish therefrom, that the public right of fishery does not include the right to take the soil, or fish shells, part of the soil, except such slight portions of the soil as would necessarily and ordinarily be attached to shell-fish when taken. So, the public have no right to take mussel-bed manure from private flats,⁷ or sand, gravel,

¹ *Schenck v. Wood*, 13 Johns. 346; *Hewlett v. Cock*, 7 Wend. 371; *Owen v. Bartholomew*, 9 Pick. 520; *Boston v. Richardson*, 105 Mass. 351, 371; *Stoutenburgh v. Murray*, 7 Johns. 5; *Hardenberg v. Schoonmaker*, 7 Johns. 12; *Wilkins v. Lamb*, 7 Cowen, 431.

² *Drury v. Midland Railroad*, 127 Mass. 571; *Rust v. Boston Mill Corporation*, 6 Pick. 158; *Sparhawk v. Bullard*, 1 Met. 95; *Barker v. Bodwell*, 3 Dane Abr. 397; *Commonwealth v. Crowninshield*, 3 Dane Abr. 397.

³ *Ante*, § 20.

⁴ Bos. & P. 472.

⁵ *Id.* p. 479; *Blundell v. Catterall*, 5 B. & Ald. 268, 299. See Hall on the Seashore (2d ed.), 187.

⁶ 7 Gray, 435.

⁷ *Moore v. Griffin*, 22 Maine, 350, 355; *Moulton v. Libbey*, 37 Maine, 493; *Clement v. Burns*, 43 N. H. 609. See *Le Strange v. Rowe*, 4 F. & F. 1048; *Cowper v. Barker*, 17 Ves. 128; *Brew v. Haren, Jr.* 11 C. L. 198; *Calmady v. Rowe*, 6 C. B. 879; *Jerwood on the Seashore*, 87. See *Malloon v. White*, 57 N. H. 152. In the

or shingle from the shore above high water, even when it is

case of *Dickens v. Shaw* (Hall on the Seashore, 2d. ed., App. 45, 60, 64, 65), the lords of the manor of Brighton sued the defendant for digging and taking away sand from the seashore of Brighton, and the plaintiffs, being put to proof of their title to the *locus in quo*, proved only, as a badge of ownership, the right to wreck. Mr. Justice Park instructed the jury *inter alia* that by the law of England the king had the right of soil between high and low-water mark, but that the subject might be in possession of it by grant or prescription, which was evidence from which they might draw an inference, and that, if the lord of the manor was entitled to wreck, this, if uncontradicted, was evidence of a title to the soil. The jury returned a verdict for the defendant, with which the presiding justice certified that he was not satisfied. Upon the hearing to obtain a new trial, Mr. Justice Bailey said (p. 50) with reference to the fact that many persons had commonly taken sand from this beach: "I do not think that it proves the right is not in the Crown; for, in general, the Crown has the right,—not with a view to the private reservation to collect the stones for itself, or to collect the sand for itself, but for the general interest for the public; and if you can, without interfering with and prejudicing the interest of the public, remove the sand and the stones, the Crown will not interfere. But if you do that which amounts to a nuisance, then you may be indicted for it." Mr. Justice Holroyd (p. 66) said: "The circumstance of any persons who chose getting sand, and their manner of conducting themselves, evidently thinking they had a right to do it, is evidence to show that the right was in the Crown, and not in the lord of the manor, who may be presumed to have been present and looking after his right, not person-

ally, but by his reeve or bailiff or some other person whose business it was to look after his property. If the right is in the Crown, the Crown is more likely not to be looking after this, which, though it may have been beneficial to the public, yet it is a sort of property which the Crown would be less likely to interfere with, and to take away the right from the subject, who is likely to derive some benefit from it." Mr. Justice Best (p. 57) said: "What Lord Hale says is that a party having one right is some evidence to show that he has another; but not that it is sufficient to show, by having the right of wreck, that he is the owner of the soil. The case here is nothing like that which he puts; he should show that he has continually taken sand, and licensed others to do so;—is there any evidence of that kind in this cause? It appears that, in ancient times, whoever thought proper to carry away sand did so. It appears that, in modern times, the lord has interrupted the parties; but it does not appear that he has, in any other instance, either licensed others to exercise this right, or exercised it himself. I think this was an extremely weak case on the part of the lord of the manor; and, in my judgment, certainly not sufficiently strong to beat down the common-law right which exists in the king. It has been argued that these acts were done by individuals at Brighton who gave no proof of right; if the right is in the king, it is not necessary they should have given that proof, because he has the common-law right. Is there any evidence to show that the common-law right has, or has not, been transferred to the lord? It is to be presumed that, while the right is in the king, he would permit these things to be done, if they were not injurious to the navigation." A new trial was

desired for ballast in aid of navigation.¹ If the sand of the shore is drifted by the wind upon a private close, it becomes a part of that close, and a custom to take such sand is bad.² No right to thus remove the soil of a landowner can be acquired by a custom, not annexed to the person or attached to a particular estate, on behalf of the inhabitants of a town or locality, however ancient or uniform such custom may have been;³ nor can the public gain such a right by general custom or prescription,⁴ inasmuch as a claim destructive of

refused. It is clear from these expressions, and from the fact that the presiding judge was not satisfied with the verdict, that, in the opinion of these judges, there is no affirmative general right to take sand or gravel from the shore, although the Crown may suffer, or even may be presumed to suffer it to be done when the public rights will not be impaired. See also Bro. Abr. tit. Customs, 46; and remarks of Holroyd, J., in *Blundell v. Catterall*, 5 B. & Ald. 268.

¹ In *Lime Regis v. Taylor*, 3 Lev. 160, it was held that a custom to take gravel for ballast in ships is a good custom. See also *Johnson v. Wyard*, 2 Lutw. 1344. But this is not supported by the later decisions cited in the following notes.

² *Blewett v. Tregonning*, 3 Ad. & El. 554.

³ *Loyd v. Jones*, 6 C. B. 81; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Bland v. Lipscomb*, 24 L. J. Q. B. 155, note; *Pitts v. Kingsbridge Board*, 19 W. R. 884; *Constable v. Nicholson*, 14 C. B. n.s. 230; *Maldon v. Woolvet*, 12 Ad. & El. 13; *Race v. Ward*, 4 El. & Bl. 702; *Rivers v. Adams*, 3 Ex. D. 361; *Chilton v. London*, 7 Ch. D. 735; *Saltash v. Goodman*, 5 C. P. D. 431; *Attorney General v. Mathias*, 4 K. & J. 579; *Allgood v. Gibson*, 34 L. J. n.s. 883; *Murgatroyd v. Robinson*, 7 El. & Bk. 391; *Padwick v. Knight*, 7 Exch. 854; *MacNamara v. Higgins*, Ir. R. 4 C. L. 326; *Dyce v. Hay*, 1 Macq. H. L. 305; *Oxenden v. Palmer*,

2 B. & Ad. 236; *Gateward's Case*, 6 Rep. 59 b; *Grimstead v. Marlowe*, 4 T. R. 718; *Willingale v. Maitland*, L. R. 3 Eq. 103; *Lynn v. Taylor*, 3 Lev. 160; *Hall on the Seashore* (2d ed.), 196 *et seq.*; *Lockwood v. Wood*, 6 Q. B. 53; *Weekly v. Wildman*, 1 Ld. Raym. 405; *Selby v. Robinson*, 2 T. R. 758; *Rogers v. Brenton*, 10 Q. B. 26; *Mellor v. Spateman*, 1 Saund. 341; *Wilson v. Willes*, 7 East, 121; *Clayton v. Corby*, 5 Q. B. 415; 5 Vin. Abr. 29; *Waters v. Lilley*, 4 Pick. 145; *Melvin v. Whiting*, 7 Pick. 79; 13 Pick. 184; *Coolidge v. Learned*, 8 Pick. 503; *Sale v. Pratt*, 17 Pick. 191, 197; *Green v. Chelsea*, 24 Pick. 71, 80; *Porter v. Sullivan*, 7 Gray, 441; *Boston v. Richardson*, 98 Mass. 351, 357; *Morse v. Marshall*, 97 Mass. 519; *Perley v. Langley*, 7 N. H. 233; *Knowles v. Dow*, 22 N. H. 387; *Nudd v. Hobbs*, 17 N. H. 524; *Merwin v. Wheeler*, 41 Conn. 14; *Hill v. Lord*, 48 Maine, 83, 98.

⁴ *Ibid.*; *Hilton v. Granville*, 5 Q. B. 701; *Fitch v. Rawling*, 2 II. Bl. 393; *Pearsall v. Post*, 20 Wend. 119; s. c. 22 Wend. 425; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Munson v. Hungerford*, 6 Barb. 265, 271; *Curtis v. Keesler*, 14 Barb. 511, 521; *Cobb v. Davenport*, 33 N. J. L. 223; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Merwin v. Wheeler*, 41 Conn. 14; *Manion v. Creigh*, 37 Conn. 462; *State v. Wilson*, 42 Maine, 9, 28; *Bethum v. Turner*, 1 Greenl. 111; *Littlefield v. Maxwell*, 31 Maine, 134, 141.

the subject-matter of a grant cannot be set up by usage. The Crown, being charged by the prerogative with a duty to protect the realm from the inroads of the sea, may restrain a subject from removing sand or stones from the seashore, if the effect will be to destroy a natural barrier against the sea.¹ So, in this country, the legislature of a State may, by statute and without compensation, prohibit the removal of stones, gravel, or sand from a beach when such removal would endanger a harbor and its navigation.² The rights of the public in tide waters and their shores, for navigation and fishery, not being affected by a transfer of the Crown's interest to individuals, it would appear that, as the public have no right to take sand from a private beach, they cannot claim that right where the shore remains in the Crown.³ When

¹ *Attorney General v. Tomline*, 12 Ch. D. 214; *Nicholson v. Williams*, L. R. 6 Q. B. 632.

² *Commonwealth v. Tewksbury*, 11 Met. 55; *Boston v. Richardson*, 105 Mass. 351, 362; *Boston v. Lecraw*, 17 How. (U. S.) 426, 433. Large stones are not "gravel" or "sand," though imbedded in and mixed with the gravel of a beach. *Brown v. Brown*, 8 Met. 573.

³ *Blundell v. Catterall*, 5 B. & Ald. 268; *per Best, J.*; *Dickens v. Shaw*, in *Hall on the Seashore* (2d ed.), App.; *Howe v. Stowell*, 1 Alcock & Nap. 356; *Bagott v. Orr*, 2 Bos. & Pul. 472; *Moore v. Griffin*, 22 Maine, 350, 355; *Dickens v. Shaw*, above cited. Mr. Hall (on the *Seashore*, 2d ed., 92, 186), argues in favor of the right of the public to take sand, etc., from the shore, although he admits that there is no direct authority upon the question in England. p. 210. He refers to the statute 7 James, c. 18, making it lawful for the inhabitants of the maritime counties of Devon and Cornwall to take sea-sand at all places under the full sea-mark "as they have heretofore used to do" (until interrupted by the owners of the lands adjacent to the sea-coast, who demanded "com-

position with them at such rates as they themselves set down"), and thinks that this act, though locally limited in its application, is declaratory of the common law. pp. 96, 209. Lord Hale, in stating how the subject may become possessed of the shore, cites this statute, saying: "The shore 'may belong to' a subject. The statute 7 James, c. 18, supposeth it, for it provides that those of Devon and Cornwall may fetch sea-sand for the bettering of their lands, and shall not be hindered by those who have their lands adjoining the sea-coast, which appears by the statute they could not formerly." *De Jure Maris*, c. 6, I. Mr. Hall considers (p. 95, note) this interpretation contrary to the words of the statute. In this country Mr. Dane (*Dane's Abr.* art. 3, § 2) says that the Massachusetts ordinance of 1641, which extended the title of the littoral proprietor to low-water mark not exceeding one hundred rods (*post*, §§ 27, 169), but reserved "free fishing and fowling" to the public, had been constantly practiced upon "as to fishing and fowling, taking sand, sea-manure, and ballast as the right of soil in flats ground." In *Moore v. Griffin*, 22 Maine, 350, 355, which re-

the shore is private property, a removal of sand or gravel therefrom by the owner is a natural and lawful use of such property, and he appears to be subject to no liability, if the Crown or the State does not interfere, for injury to the adjoining lands resulting from a consequent overflow of the sea.¹

§ 25. The right to gather seaweed and other marine growths is analagous to the right to take sand and gravel. The sea and the soil under it being the property of the Crown, the lord of a manor cannot acquire an exclusive right to take seaweed growing below low-water mark, except by grant from the Crown, or such long and undisturbed enjoyment as will establish a title by prescription.² When these products become detached from the sea-bottom by natural causes, and float from place to place with the tides and currents, a different rule is applied in practice. While sea sand does not lose its character of realty by natural changes,³ seaweed is, by some authorities, classed with personal property.⁴ It does not appear that the Crown has ever made any

lated to flats between high and low-water mark, Shepley, J., said, with reference to Mr. Dane's statement: "No such right of taking sand, manure, or ballast is reserved in the grant made to the owner of the adjoining land. And Mr. Dane does not refer to any authority or decision in support of that practice. No such practice can be recognized as depriving the legal owner of his rights according to his title, unless supported by proof that would establish a common right. The language of the ordinance cannot be extended beyond the obvious meaning of the words fishing and fowling. . . . Neither the ordinance nor the common law would authorize the taking of 'mussel-bed manure' from the land of another person." See, also, *Clement v. Burns*, 43 N. H. 609; *Emans v. Turnbull*, 2 Johns. 313, 322. The recent case of *Merwin v. Wheeler*, 41 Conn. 14, related to the taking of sand by prescription from a

beach *above* high-water mark, and the decision there was that an individual, as one of the public, could not acquire such a right by prescription, it not being incident to an estate in other lands.

¹ *Attorney General v. Tomline*, 12 Ch. D. 215; *Hudson v. Tabor*, 2 Q. B. D. 290. As to the remedy in equity to protect private property from being endangered by the removal of shingle, etc., forming a defence against the sea, see *Clowes v. Beck*, 13 Beav. 347; *Chalk v. Wyatt*, 3 Meriv. 388; *Cowper v. Baker*, 17 Ves. 128; *Maloon v. White*, 57 N. H. 152.

² *Benest v. Pipon*, 1 Knapp P. C. 68.

³ *Blewett v. Tregonning*, 3 Ad. & El. 554.

⁴ *Church v. Meeker*, 34 Conn. 421; *Mather v. Chapman*, 40 Conn. 382. Seaweed, cast upon the shore by the sea, and left ungathered by him who has the exclusive ownership of such shore, has been held in Ireland not to

exclusive claim to seaweed,¹ and the public may have a permissive right to take it, when not cast upon those parts of the shore which have passed into private hands. Floating seaweed may thus, in point of fact, be regarded as having no owner. In the few instances in which the title to it has been called in question, the contest has been between those who claimed by prior occupancy and the proprietor upon whose land it was carried by the sea.² If seaweed is deposited by storms or tides upon the upland above high-water mark, or upon flats below high-water mark, belonging to an individual, the owner of the land is constructively first occupant, although he may leave it ungathered.³ A stranger can-

be the subject of larceny. *Queen v. Clinton*, Ir R. 4 C. L. 6. In the recent Irish case of *Brew v. Haren*, Ir. R. 11 C. L. 198; s. c. Ir. R. 9 C. L. 29, it was held (two judges dissenting) that trover lay by one who owned the shore down to low-water mark, for the wrongful taking of seaweed cast upon the shore between high and low-water mark, though such seaweed had been left ungathered by the plaintiff; it being considered that trover might be maintained for the conversion of an article the taking of which would not constitute larceny. Upon the other hand, Chancellor Kent treated seaweed, when washed ashore, as realty. In the leading case of *Emans v. Turnbull*, 2 Johns. 313, 322, he said: "The seaweed thus thrown up by the sea" (*i.e.* upon a portion of the seashore which was private property) "may be considered as one of those marine increases arising by slow degrees; and according to the rule of the common law, it belongs to the owner of the soil. The rule is that, if the marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign (2 Black. Com. 261; Harg. Law Tracts, 28). The seaweed must be supposed to have accumulated gradually. The slow increase, and

its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachments of the sea, to which other parts of his estate may be exposed; this is one sound reason for vesting these marine increments in the proprietor of the shore. The *jus alluvionis* ought in this respect to receive a liberal encouragement in favor of private right."

¹ *Brew v. Haren*, Ir. R. 11 C. L. 205, *per* Fitzgerald, J., who further says: "There seems also to be an absence of any claim to the property in such weed before appropriation on behalf of the grantee of the Crown until very recent times. The grantee of the Crown usually asserted his rights, whatever they were, by excluding the public from going on or over his lands to the seashore; or by excluding them from the seashore when he was in a position to assert his exclusive title to the soil of the seashore."

² *Church v. Meeker*, 34 Conn. 421; *Mather v. Chapman*, 40 Conn. 382; *Chapman v. Kimball*, 9 Conn. 38; *Hill v. Lord*, 48 Maine, 83.

³ *Emans v. Turnbull*, 2 Johns. 313, 321; *Parsons v. Miller*, 15 Wend. 561;

not lawfully enter upon land for the purpose of taking seaweed,¹ and a statute which gives it to a person other than

Phillips *v.* Rhodes, 7 Met. 322; Barker *v.* Bates, 13 Pick. 255; Anthony *v.* Gifford, 2 Allen, 549; Proprietors of Cohasset Flats *v.* Tower, 24 Law Rep. 734; Chapman *v.* Kimball, 9 Conn. 38; Church *v.* Meeker, 34 Conn. 421; Mather *v.* Chapman, 40 Conn. 382; Moore *v.* Griffin, 22 Maine, 350; Clement *v.* Burns, 43 N. H. 609; Kenyon *v.* Nichols, 1 R. I. 106, 411; Bailey *v.* Sisson, Id. 233, 240; Hall *v.* Lawrence, 2 R. I. 218; Baird *v.* Fortune, 7 Jur. N. S. 926; Howe *v.* Stowell, 1 Alcock & Nap. 348; Healy *v.* Thorne, Ir. R. 4 C. L. 495, 499; Queen *v.* Clinton, Ir. R. 4 C. L. 6; Lowe *v.* Govett, 3 B. & Ad. 863; Brew *v.* Haren, Ir. R. 11 C. L. 198; s. c. Ir. R. 9 C. L. 29. See East Hampton *v.* Kirk, 68 N. Y. 459; s. c. 6 Hun. 257. In Kenyon *v.* Nichols, 1 R. I. 106, 411, an action on the case was sustained for disturbance of the plaintiff's commonable right by taking seaweed from the beach. See, also, Knowles *v.* Nichols, 2 Curtis, 571; Knowles *v.* Nichols, 2 R. I. 198; Knowles *v.* Knowles, 12 R. I. 400, 406, 411. And see, generally, Hall *v.* Lawrence, 2 R. I. 218; Bailey *v.* Sisson, 1 R. I. 233.

¹ The case of Howe *v.* Stowell, 1 Alcock & Nap. 348, was trespass for breaking and entering the plaintiff's close, and the defendant's plea of justification that the close in question was the seashore, and that the plaintiff entered under the general right of the king's subjects to enter and carry away seaweed left by the tide, was held to be bad. Jebb, J., here said: "This being the claim of a right in derogation of, and as a qualification of the king's general right, it ought not to be allowed without some decision, or some authority, or some reason drawn from some decision or authority in favor of it. That the king has the soil of the shore from high

to low-water mark, as well as beyond that mark, is clear from the authority of Hale, as also from the charter of the Admiral of England. Callis, 39; Davies, 153. These prerogatives are qualified or adapted to the public benefit by the clearly allowed common right of the king's subjects to fish in the sea, or arms or creeks thereof, as a public right of fishery (subject to exception in case of exclusive rights), and this liberty seems to extend to the taking of shell-fish left on the seashore upon the reflux of the tide, between high and low-water mark (Bagott *v.* Orr, 2 Bos. & P. 472), upon the same reason, namely, that the taking of fish is for the immediate sustenance of man, a reason that does not apply to the liberty of taking seaweed — a liberty which may, in many situations, and under many circumstances, be very reasonable and beneficial, and which may be established by local custom, but can be legally claimed for all the king's subjects, or any portion of them, by virtue of such local custom, and not as being part of the common law." In the subsequent Irish case of Healy *v.* Thorne, Ir. R. 4 C. L. 495, 499, the court said: "With respect to the contention by defendant that the verdict was against the weight of evidence, it is to be considered that in this action of trespass, the plaintiff was in possession; the defendant is a mere trespasser. The public, in such cases, have no right to go on the seashore, between high and low-water mark, to take seaweed. Howe *v.* Stowell, Alcock & Nap. 348. Their rights are those of navigation and fishing. These are the privileges which the public enjoy as of right." See also Queen *v.* Clinton, Ir. R. 4 C. L. 6; Brew *v.* Haren, Ir. R. 11 C. L. 198; s. c. Ir. R. 9 C. L. 29; Mulholland *v.* Killen, Ir.

the landowner is unconstitutional.¹ "By a liberal construction of the *jus alluvionis*," says Bigelow, C. J.,² "it is held that seaweed, kelp, and other marine plants, when detached from the bottom of the sea and thrown on the shore or beach, become vested in the owner of the soil. But these marine products do not become the property of the riparian proprietor until they are cast on the land or shore, so that they rest there and may be justly said to be attached to the soil. So long as they are afloat, and driven or moved from place to place by the rising tide, it is wholly uncertain where they may find a resting-place; and no one can claim ownership in them as appertaining to the particular part of the shore or beach which belongs to him. And this is true, whether they are wholly afloat, so that they do not come in contact with the bottom, or only partially so, or to such an extent that they occasionally, by the motion of the waves or

R. 9 Eq. 471, 482. In the recent case of *Mather v. Chapman*, 40 Conn. 382, 399, the court, without noticing these cases, used much broader language, saying: "The right of taking seaweed would seem to stand upon the same ground as the right of taking fish. We see no reason for making a distinction between the vegetable and animal products of the ocean. Neither, in the state of nature, is the property of any one; the title to both depends upon first occupancy. It is agreed that while afloat both are alike common; why, when the tide recedes and leaves shell-fish and seaweed on the shore, should the seaweed belong to the riparian proprietor when confessedly the shell-fish remains common property?" It was held in that case that, while the owner of the seashore, or of land bordering on the sea, is constructively the first occupant and owner of seaweed which is cast upon such land or shore by the tide, yet, if seaweed is left upon the shore between high and low-water mark, it is subject to appropriation by the first comer.

¹ *Cohasset Proprietors v. Tower*, 24 Law Rep. 734. The phrase "privilege of the shores," employed in a statute, includes the right to take gravel and seaweed. *Cushing v. Worrick*, 9 Gray, 382; *Ripley v. Knight*, 123 Mass. 515.

² *Anthony v. Gifford*, 2 Allen, 549. In this case the plaintiff brought an action of trover for the conversion of seaweed which he had collected and taken from a beach adjoining land from which the defendants claimed the right in gross to take seaweed. The question was as to the meaning of the word "adrift" in the General Statutes of Massachusetts, c. 83, § 20, providing that "any person may take and carry away kelp or other seaweed between high and low-water mark, whilst the same is actuallyadrift in tide waters." A ruling that, if during flood tide the seaweed was in such a position that each wave moved it, it wasadrift, although the bottom of the mass might touch the beach, was held to be correct.

the rise of tide, touch or rest on the beach." If seaweed, though touching the soil under the water, is really adrift,¹ or if it is deposited upon a part of the seashore which is not private property,² it is not added to the adjoining land, and is not the property of the owner of such land. In such case, it belongs to him who first appropriates it.³ The privilege of taking seaweed from another's land or beach is a profit *à prendre*, and may be conveyed without passing the soil.⁴ A sale of all the sea-manure that may land on a certain beach during one year conveys no interest in the beach.⁵ In *Knowles v. Dow*,⁶ it was decided that a custom for the inhabitants of a town to haul seaweed upon the plaintiff's close, and there deposit it, and afterwards to take it away at pleasure, was not unreasonable or void.

§ 26. In the case of *Blundell v. Catterall*,⁷ the court of King's Bench decided that the public have no common-law right to bathe in the sea. The plaintiff in that case was the owner of the shore, and had an exclusive right to fish there with stake nets; and the defendant, who was a servant at a hotel near by, was sued for driving bathing-machines across the shore and into the sea for the purpose of bathing. The reasoning of the court was not confined to the grounds, that bathing at the place in question, with carriages or on foot, was an interference with the plaintiff's private right of fishery with stake nets, or that the use of bathing-machines might be distinct from the right to bathe without them, but pro-

¹ *Anthony v. Gifford*, 2 Allen, 549.

² *Mather v. Chapman*, 40 Conn. 382; *Peck v. Lockwood*, 5 Day, 22; *Nudd v. Hobbs*, 17 N. H. 527; *Arnold v. Mundy*, 1 Halst. 1. 12. In Connecticut and New Jersey, riparian proprietors have no legal title to unimproved flats below high-water mark. *Post*, c. 5.

³ *Ibid.*

⁴ *Hill v. Lord*, 48 Maine, 83, 100; *Nudd v. Hobbs*, 17 N. H. 524; *East Hampton v. Kirk*, 68 N. Y. 459; 84 N. Y. 215.

⁵ *Parsons v. Smith*, 5 Allen, 578.

⁶ 22 N. H. 387.

⁷ 5 B. & Ald. 268. See *Mace v. Philcox*, 15 C. B. n. s. 600; 10 Jur. n. s. 680; 33 L. J. (C. P.) 124, deciding that, under a special statute for the regulation of the mode of sea-bathing and licensing bathing-machines, those who obtain such a license are not justified in placing the machines on such parts of the shore as are private property.

ceeded upon the broad ground that there was no public right to frequent the shore for the purpose of bathing, either on foot or with carriages.¹ It has also been held in North Carolina that the privilege of approaching the sea for the purpose of bathing is not a right of necessity, and that there is no general right of access to the sea for this purpose.² The right of the public to pass over the shore between high and low-water mark is not limited, it seems, to the period when the tide is in, but exists also when the shore is dry;³ and if the decision in *Blundell v. Catterall* relates only to such parts of the shore as are private property, the only practical restraint upon the privilege of sea-bathing appears to be that which is imposed by decency and respect for public morals.⁴

§ 27. The presumption that the shore belongs to the Crown, as far as the high-water mark, gives rise to the presumption that the title to lands adjacent to tide water extends only to this line, and places the burden of proof upon those who claim beyond it.⁵ The public rights of navigation and

¹ See *McManus v. Carmichael*, 3 Iowa, 1, 55; *Laird v. Briggs*, 19 Ch. D. 22.

² *Hatfield v. Baum*, 13 Ired. 394. Kent says: "The case of *Bagott v. Orr* may be considered as shaken by that of *Blundell v. Catterall*, 5 B. & Ald. 268; and the doctrine of *Peck v. Lockwood* seems to be very questionable." 3 Kent Com. 417, note (c). *Peck v. Lockwood*, 5 Day, 22, follows *Bagott v. Orr*, 2 B. & T. 472, deciding that the public may enter upon the shore for the purpose of taking shell-fish. *Bagott v. Orr* is several times referred to in *Blundell v. Catterall*, with no intimation of an intention to overrule it; and as the right to take shell-fish is included in the public right of fishing, the latter decision does not affect it. See *Moulton v. Libbey*, 37 Maine, 472, 491.

³ *State v. Wilson*, 42 Maine, 9; *Colchester v. Brooke*, 7 Q. B. 889; *Marshall v. Ulleswater Co.*, L. R. 7 Q.

B. 166; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Rex v. Russell*, 6 B. & C. 566; *Original Hartlepool Co. v. Gibb*, 1 Ch. D. 713; *Attorney General v. Conservators of the Thames*, 1 Hem. & M. 32; *South-Eastern Railway Co. v. Darling*, 5 C. B. n. s. 821.

⁴ *Rex v. Crunden*, 2 Camp. 89.

⁵ *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset v. Fogwell*, 5 B. & C. 875; *Lowe v. Govett*, 3 B. & Ad. 863; *Smith v. Stair*, 6 Bell, App. Cas. 487; *Widney v. Lord Commissioners*, 12 Moo. P. C. 473; *Howard v. Ingersoll*, 13 How. (U. S.) 381, 421; *United States v. Pacheco*, 2 Wall. 587; *Pollard v. Hagan*, 3 How. 212; *Mobile v. Hallett*, 16 Peters, 266; *Barney v. Keokuk*, 94 U. S. 324, 336; *Bowman v. Wathen*, 2 McLean, 376; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 415; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Wiswall v. Hall*, 3 Paige, 313; *Storer v. Freeman*, 6 Mass. 435, 439; *Commonwealth v. Charlestown*,

fishery extend to the same limit, whether the shore itself is public or private property.¹ The low-water mark is an equally important boundary, since, under the decision in *Regina v. Keyn*,² and in the absence of statute, it is the limit of the nation's territory on the external coast, and also limits the common-law jurisdiction of counties on the seacoast.³ Lord Hale mentions three kinds of tides as seeming to give rise to three kinds of shore:⁴ first, the high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoctials; second, the spring tides, which happen twice every month, at the full and change of the moon; and third, the ordinary or neap tides, which happen between the full and change of the moon, twice in twenty-four hours. He concludes that, by the common law, the shore, both of the sea and of the arms of the sea, does not include the soil which is overflowed by the high spring tides or by the spring tides, and that the rights of the sovereign and the public extend only to the point reached by the ordinary tides. In the case of *Attorney General v. Chambers*,⁵ this view was adopted, and

1 Pick. 180, 182; *Porter v. Sullivan*, 7 Gray, 443; *Wonson v. Wonson*, 14 Allen, 82; *Hathaway v. Wilson*, 123 Mass. 361; *Bell v. Gough*, 23 N.J. L. 624; 22 Id. 441 and 21 Id. 156; *East Haven v. Hemingway*, 7 Conn. 186; *Mather v. Chapman*, 40 Conn. 382; *Hagan v. Campbell*, 8 Porter, 9, 25; *Teschemacher v. Thompson*, 18 Cal. 11; *Rondell v. Fay*, 32 Cal. 354, 363; *People v. Morrill*, 26 Cal. 336, 353; *Ward v. Mulford*, 32 Cal. 365, 372; *More v. Massini*, 37 Cal. 432; *Brumagin v. Bradshaw*, 39 Cal. 24; *Ball v. Slack*, 2 Whart. 508, 539; *Boulo v. Mobile Railroad Co.*, 55 Ala. 480; *Martin v. O'Brien*, 34 Miss. 21.

¹ *Ibid.* The word "foreshore," used in the later English decisions, appears, by 29 & 30 Vict. c. 62, § 7, to denote "the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom, as far up the same as the tide flows (and which are

hereinafter for brevity called the foreshore)." See, also, *Trustees v. Bootle*, 2 Q. B. 4; *Penryhn v. Holm*, 46 L. J. Ex. 506; 37 L. T. 133; 25 W. R. 498.

² 2 Ex. D. 63; *ante*, §§ 11-14.

³ *Ante*, § 14. See p. 33, n. 1.

⁴ *De Jure Maris*, c. 6, I.; c. 4, II.; *Hargrave's Law Tracts*, 12, 26.

⁵ 4 De Gex, M. & G. 206; 4 De Gex & J. 55. Alderson, B., here said: "Mr. Justice Holroyd, no mean authority, in his very elaborate judgment in the case of *Blundell v. Catterall*, 5 B. & Ald. 268, 290, mentions this as one of the instances in which the Common Law differs from the Civil Law, and says that it is clear that according to our law it is not the limit of the highest tides of the year, but the limit reached by the highest ordinary tides of the sea, which is the limit of the shore belonging *prima facie* to the Crown. What then are these 'highest ordina-

it was held that "the average of the medium tides, in each quarter of a lunar revolution during the year, gives the limit, in the absence of all usage, to the rights of the crown on the seashore." In other words, the boundary is the medium line between the ordinary line of high water in ordinary spring tides, at the full and change of the moon, and the ordinary line of high water at neap tides, at about midway in time between the full and change of the moon.¹

ry tides'? Now we know that in fact the tides of each day, nay, even each of the tides of each day, differ in some degree as to the limit which they reach. There are the spring tides at the equinox, the highest of all. These clearly are excluded in terms by Lord Hale, both in p. 12 and p. 26 of his treatise *De Jure Maris*, for though in one sense these are ordinary, *i.e.*, according to the usual order of nature, and not caused by accidents of the winds and the like, yet they do not ordinarily happen, but only at two periods of the year. These then are not the tides contemplated by the common law, for they are not 'ordinary tides,' not being 'of common occurrence.' This may perhaps apply to the spring tides of each month, exclusive of the equinoctial tides; and, indeed, if the case were without distinct authority on this point, that is the conclusion at which we might have arrived. But then we have Lord Hale's authority, p. 26, *De Jure Maris*, who says, 'Ordinary tides or neap tides which happen between the full and the change of the moon' are the limit of 'that which is properly called *littus maris*,' and he excludes the spring tides of the month, assigning as the reason that the lands covered with these fluxes are for the most part of the year dry and manorial, *i.e.*, not reached by the tides. And to the same effect is the case of *Lowe v. Govett*, 3 B. & Ad. 863, which excludes these monthly spring tides also. But we think that Lord Hale's

reason may guide us to the proper limit. What are then the lands which for the most part of the year are reached and covered by the tides? The same reason that excludes the highest tides of the month (which happens at the springs) excludes the lowest high tides (which happen at the neaps), for the highest or spring tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which we think may be best adopted. It is true of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore, therefore, is about four days in every week, *i.e.*, for the most part of the year, reached and covered by the tides. And as some not indeed perfectly accurate construction, but approximate, must be given to the words 'highest ordinary tides,' used by Mr. J. Holroyd, we think, after fully considering it, that this best fulfils the rules, and the reasons for it, given in our books."

¹ *Commonwealth v. Roxbury*, 9 Gray, 451, 483. Under the civil law, the shore extends as far as the highest waves reach in winter. *Inst. lib. 2, tit. 1, § 3*; *Dig. lib. 50, tit. 16, § 112*; *Civil Code of Louisiana, art. 4*; *Smith v. Stair*, 6 Bell, App. Cas. 487; 6 Cl.

The expression, "ordinary high and low-water mark," which is generally used in defining the shore, signifies ordinary low-water mark as well as high.¹ Under the Massachusetts Colony ordinance of 1647, which extended the title of littoral proprietors to low-water mark, not exceeding one hundred rods, the low-water mark is the line of extreme low water, if within one hundred rods;² but in Maine, under this ordinance, the low-water mark is determined by the ebb of ordinary tides, as at common law.³ These rules apply to tidal rivers and to the arms and inlets of the sea, as well as the sea itself, but they have no application to fresh waters.⁴ The terms, "ordinary low water" or "low water," says Wayne, J.,⁵ "are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring or neap tides. Such a difference is uniform twice within

& Fin. 628; *Galveston v. Menard*, 23 Texas, 349, 398.

¹ Hale, *De Jure Maris*, c. 4, II.; c. 6, I.; *Dickens v. Shaw*, reported in Hall on the Seashore (2d ed.), Appendix, 50, 64; *Blundell v. Catterall*, 5 B. & Ald. 290; *Lowe v. Govett*, 3 B. & Ad. 863; *Harvey v. Lyme Regis*, L. R. 4 Ex. 260; *Attorney General v. Chambers*, 4 De Gex, Macn. & Gord. 206; *East Haven v. Hemingway*, 7 Conn. 186; *Church v. Meeker*, 34 Conn. 421, 424; *Teschmacher v. Thompson*, 18 Cal. 11; *People v. Morrill*, 26 Cal. 336, 353; *Ward v. Mulford*, 32 Cal. 365, 372; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348, 357; *Gough v. Bell*, 22 N. J. L. 441; 23 Id. 624, 685; *Seaman v. Smith*, 24 Ill. 521, 524; *Howard v. Ingersoll*, 13 How. (U. S.) 381, 417; *Walker v. Marks*, 2 Sawyer, 152, 157.

² *Storer v. Freeman*, 6 Mass. 435, 438; *Sparhawk v. Bullard*, 1 Met. 95, 108; *Commonwealth v. Charlestown*, 1 Pick. 180, 183; *Attorney General v. Boston & Maine Railroad Co.*, 3 Cush. 1; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Commonwealth v. Boston & Maine Railroad*

Co., 3 Cush. 1; *Monson v. Monson*, 14 Allen, 71, 82; 9 Gray, 515, 521, note; *Attorney General v. Woods*, 108 Mass. 436, 440; *Commonwealth v. Roxbury*, 9 Gray, 451, 491, 515, 521.

³ *Gerrish v. Union Wharf Co.*, 26 Maine, 384.

⁴ Hale, *De Jure Maris*, c. 4, II.; *Royal Fishery of the Banne*, Sir John Davies, 149; *United States v. Pacheco*, 2 Wall. 587; *Wheeler v. Spinola*, 54 N. Y. 377; *Commonwealth v. Roxbury*, 9 Gray, 451, 491; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Kean v. Stetson*, 5 Pick. 492, 495; *Montgomery v. Reed*, 69 Maine, 510; *State v. Sargent*, 45 Conn. 358; *Galveston v. Menard*, 23 Texas, 349.

⁵ *Howard v. Ingersoll*, 13 How. 381, 417. And see *Id.* p. 428; *Dutton v. Strong*, 1 Black, 23, 32; *Handly v. Anthony*, 5 Wheat. 374; *Child v. Starr*, 4 Hill, 369, 376; *Canal Commissioners v. People*, 5 Wend. 423, 446; *Halsey v. McCormick*, 13 N. Y. 296, 298; *Wheeler v. Spinola*, 54 N. Y. 377, 385; *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Maine, 198; *Stover v. Jack*, 60 Penn. St. 339; *Lacy v. Green*, 84 Penn. St. 514.

every month of the year; and, because it is so, it is termed ordinary. In that part of a river in which there is no ebb and flow, the changes in the current are irregular and occasional, without fixed quantity or time of recurrence, except as they are periodical with the wet and dry seasons of the year. And low water is the furthest receding point of ebb tide."

§ 28. The words "flats"¹ and "strand"² denote the land between the lines of high and low water, like the shore. The term "coast," or "sea-coast," appears to have no fixed meaning apart from the context, and to be equally applicable to the space between high and low-water mark, or to the territory bordering on the sea, or to that part of the sea which adjoins the land.³ The word "beach" is synonymous with "shore." In Maine, a statute which prohibited cattle running on a certain "beach," and charged a committee to be appointed by a town with the execution of the law, was held to apply only to the space between high and low-water mark.⁴ And in a later case in the same State, in which the same view was taken, it was said that this word, which was there used in a contract, must have some limited meaning, and could not apply to the large sand wastes above high-

¹ *Storer v. Freeman*, 6 Mass. 435, 439; *Saltonstall v. Long Wharf*, 7 Cush. 195, 201; *Doane v. Willcutt*, 5 Gray, 328, 335; *Church v. Meeker*, 34 Conn. 421, 424, 429; *Stannard v. Hubbard*, 34 Conn. 376; *Montgomery v. Reed*, 69 Maine, 510.

² *Doane v. Willcutt*, 5 Gray, 328, 335.

³ Callis says that the "sea-coast" certainly contains the shore and banks, and that, while a shore is sometimes dry land, and sometimes water, and a creek is always sea and never land, a coast is always dry land. Callis on Sewers, 54-57. Its meaning must, however, be gathered from the context. The indefiniteness of this term, and also of "shore," as sometimes

used, appears in the Convention of 1818, between Great Britain and the United States, which provided that the inhabitants of both countries should have the liberty to fish on a part "of the southern coast of Newfoundland," "on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joly on the southern coast of Labrador to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast"; and also "to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, hereinbefore described, and of the coast of Labrador."

⁴ *Cutts v. Hussey*, 15 Maine, 227.

water mark, like those on Cape Cod.¹ In Massachusetts² and New York³ the definition of the shore is considered to be an accurate definition of a beach also; but, in a recent case in Connecticut, the court said that the word "beach" has no such inflexible meaning that it must denote land between high and low-water mark.⁴ The word "waste" is also a sufficient description of the shore, and passes it in a private grant, if the estate to which the waste belongs extends to low-water mark.⁵ The shore may also pass under the terms "sedge-flat,"⁶ "sea grounds,"⁷ "ripa," "bank,"⁸ "anchorage-ground,"⁹ and "sand,"¹⁰ when a different construction is not required by the context. The phrase "tide lands,"¹¹ employed in the statutes of California, applies to the shore between ordinary high and low-water mark, and not to the soil which is permanently submerged. "Salt meadows,"¹²

¹ Littlefield v. Littlefield, 28 Maine, 180; Hodge v. Boothby, 48 Maine, 68.

² Doane v. Willcutt, 5 Gray, 328, 335; Niles v. Patch, 13 Gray, 254, 257. See Brown v. Lakeman, 17 Pick. 444, 446; s. c. 15 Pick. 151.

³ East Hampton v. Kirk, 68 N. Y. 459; s. c. 6 Hun, 257. See Hastings v. Ival, L. R. 19 Eq. 558, 580.

⁴ Melvin v. Wheeler, 40 Conn. 14; Mather v. Chapman, 40 Conn. 382.

⁵ Attorney General v. Hanmer, 4 Jur. N. S. 751; 27 L. J. Ch. 837; Attorney General v. Jones, 33 L. J. Ex. 249; 2 H. & C. 347.

⁶ Church v. Meeker, 34 Conn. 421, 424; Peck v. Lockwood, 5 Day, 24. As to the effect of such words as "stagnum," "gurgis," "mariscus," "palus," "marettum," "saliva," etc., employed in ancient grants, see Co. Litt. 4 b, 5 a.

⁷ Scratton v. Brown, 4 B. & C. 485. The word "grounds" does not generally include land under water. State v. Jersey City, 1 Dutch. 525, 530.

⁸ "Ripa" or "bank" properly refers to hard, dry land, and to the margin of fresh waters rather than salt. But "the bank of a bay" may

include a sand-bank or mud-bank, though alternately covered and uncovered by the flux and reflux of the sea, and so be equivalent to "shore." *In re Belfast Dock*, Ir. R. 1 Eq. 128, 139.

⁹ Foreman v. Whitstable Free Fishers, L. R. 4 H. L. 266; L. R. 2 C. P. 688; L. R. 3 C. P. 578; *Le Strange v. Rowe*, 4 F. & F. 1048; *Calmady v. Rowe*, 6 C. B. 891.

¹⁰ In the case of a warranty deed which purported to convey all the fishing rights, rights to the "sand," and all useful things that may drift upon the beach, and contained a description of the land which constituted the beach, with words of inheritance, it was held that the word "sand" was equivalent to "land," and that the fee passed by the deed. *Spinney v. Marr*, 41 Maine, 352.

¹¹ *People v. Davidson*, 30 Cal. 379; *Randall v. Fay*, 32 Cal. 354; *Walker v. Marks*, 2 Sawyer, 152; 17 Wall. 648; *Supervisors v. United States*, 18 Wall. 71; *People v. Morrill*, 26 Cal. 336; *Patterson v. Tatum*, 3 Sawyer, 164.

¹² *Church v. Meeker*, 34 Conn. 421, 429.

employed in a deed, denotes only the land above high-water mark which is overflowed by the spring or extraordinary tides.

§ 29. The shore partakes of the nature both of the sea which covers it and of the land which it defends.¹ When this term is used in deeds and legal instruments, it comprehends the soil itself, and is inapplicable to a grant of a mere privilege or easement.² The shore may pass under the word "terra."³ So a devise of "a beach for drift-wood and timber" is a gift of the land itself, and not of a mere easement in the land.⁴ But it is not to be construed according to its technical meaning if such construction would violate the intention of the parties. Where land adjacent to the sea was conveyed by a deed which reserved the privilege "of piling up seaweed on the shore," it was held that the right reserved was to pile the seaweed upon the upland, and not below high-water mark, where it would be swept away by the tide.⁵ So, where a certificate filed by a railroad company described one terminus of a tunnel as being "on the western shore of the Hudson River, and within or near Jersey City or Hoboken," the word "shore" was held to be used in the sense in which Jersey City or Hoboken is said to be situated on the shore of the river.⁶

¹ "The shore is not counted for lands or grounds gained from the sea, or left by it, because at every full sea it is covered with the waters thereof." *Callis on Sewers*, 54. "Shores and such grounds, which *alternis vicibus* are wet and dry, are not accounted relinquished grounds." *Id.* 274.

² *Scratton v. Brown*, 4 B. & C. 485, 496; *Beaufort v. Swansea*, 3 Exch. 413.

³ *Beaufort v. Swansea*, 3 Exch. 413, 425.

⁴ *Brown v. Lakeman*, 17 Pick. 444; 13 Pick. 151; *Lakeman v. Butler*, 17 Pick. 436; *Phillips v. Rhodes*, 7 Met. 322, 325.

⁵ *Mather v. Chapman*, 40 Conn. 382.

⁶ *State v. Hudson Tunnel Railroad Co.*, 38 N. J. L. 548. See *Hathaway v. Wilson*, 123 Mass. 359, 361, 362; *Ripley v. Knight*, 123 Mass. 515; *Saltonstall v. Long Wharf*, 7 Cush. 195, 201; *Doane v. Willcutt*, 5 Gray, 328, 335; *Niles v. Patch*, 13 Gray, 254; *Hodge v. Boothby*, 48 Maine, 68.

CHAPTER II.

OF PROPERTY IN TIDE WATERS IN THIS COUNTRY.

SECTION.

30. The right to this property prior to the Revolution.
 31. The powers possessed by the colonies.
 32. The title acquired by the States at the Revolution, and the nature of this interest.
 33. The commercial powers and admiralty jurisdiction ceded to the general government.
 34. The power of Congress over navigable waters.
 35. The rights of the State in relation to the power of Congress.
 36. State grants in navigable waters, how construed.
 37. Rights acquired by prescription against the State.
 38. The State's control of fisheries within its limits.
 39. The rights of the new States in their navigable waters.
 40. The power of the general government over navigable waters not included in any State.
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§ 30. In territories acquired by discovery, the rights of the new settlers are determined by the laws of the mother-country, which become immediately applicable;¹ but in lands acquired by conquest, the conqueror may prescribe what law he pleases.² The early English settlements in this country, upon the Atlantic coast, were of the former class,³ the lands which

¹ 1 Black. Com. 107; *Bogardus v. Trinity Church*, 4 Paige, 178; 15 Wend. 111.

² *Ibid.*; *Calvin's Case*, 7 Co. 17; *Campbell v. Hall*, 1 Cowper, 204, 208; 1 Black. Com. 107; 1 Kent Com. 473, note; *United States v. Percheman*, 7 Peters, 51, 87; *Langdeau v. Hanes*, 21 Wall, 521, 527; *McMullen v. Hodge*, 5 Texas, 34.

³ Blackstone's statement (1 Black.

Com. 107, 108), that the American plantations were principally obtained by conquest and driving out the natives, or by treaties, and that the common law of England, as such, has no allowance or authority there, and Lord Holt's remark in *Salk*. 666, that "the law of England does not extend to Virginia; her law is what the king pleases," have been always treated as erroneous in this country. *Arnold v.*

were occupied by the colonies being claimed by the Crown of England by right of discovery. A grant from the king could alone confer title to the soil, and was the only source of authority for exercising powers of government over the lands so granted.¹ The absolute right of property and dominion was thus held to belong to the European nation by which any particular portion of the country was first discovered, as if it had been found without inhabitants.² The Indians were regarded as mere temporary occupants, having no title to the soil which they could convey, except to the nation which claimed the territory, or with its express consent.³ Hence, a grant by the Indian tribes neither augmented the title acquired by discovery, nor did it alone possess such validity as would enable the grantee to resist a title to the same lands under a royal grant.⁴ Where Indian grants were recognized and confirmed by the colonial gov-

Mundy, 1 Halst. 1, 82, 83; *Bell v. Gough*, 23 N. J. L. 624, 707; *Johnson v. McIntosh*, 8 Wheat. 543; *Martin v. Waddell*, 16 Peters, 367; *Cherokee Nation v. Georgia*, 5 Peters, 1; *Worcester v. Georgia*, 6 Peters, 515; *Holden v. Joy*, 17 Wall. 211, 243, 244; *United States v. Cook*, 19 Wall. 591; *Jackson v. Porter*, 1 Paine, C. C. 457; *Mitchell v. United States*, 9 Peters, 745; *Clark v. Smith*, 13 Id. 195; 8 Opin. Atty. Gen. 262, 264; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188; *Beecher v. Weathersby*, 95 U. S. 517, 525; *De Armes v. New Orleans*, 5 La. 132; *Penn. v. Baltimore*, 1 Ves. 445; *Commonwealth v. Roxbury*, 9 Gray, 451, 478; *Jackson v. Ingraham*, 4 Johns. 163; *Jackson v. Waters*, 12 Johns. 365; *Jackson v. Hudson*, 3 Johns. 375; 1 Kent Com. 258; 3 Id. 377 *et seq.*; *Jackson v. Wood*, 7 Johns. 295; *Gilbert v. Wood*, 7 Johns. 290; *Goodell v. Jackson*, 20 Johns. 693; *Penobscot Tribe v. Veazie*, 58 Maine, 402; *Veeder v. Guppy*, 3 Wis. 502. In England it is held that when English subjects establish themselves in uninhabited or barbarous lands, they continue subject to

the sovereignty of England and to such of its laws as are applicable to their new condition; but that acts of Parliament, passed after the settlement of the new colonies, do not bind them unless they are expressly named. *Anon.* 2 P. Wms. 75; *Blankard v. Galdy*, 2 Salk. 411; *Campbell v. Hall*, 1 Cowper, 204, 208; *Attorney General v. Stewart*, 2 Mer. 143, 159; *Advocate General v. Dossee*, 9 Jur. N. S. 877; *Dutton v. Howell*, Show. Parl. Cas. 31, 32; *Picton's Case*, 30 Howell's State Trials, 903; *Pitt v. Dacre*, 3 Ch. D. 295; *Martin v. Waddell*, 16 Peters, 367; *Pollard v. Hagan*, 3 How. 212, 229; 1 Black. Com. 107, 108; *Johnson v. McIntosh*, 8 Wheat. 543, 595.

¹ *Ibid.*

² *Ibid.*

³ See authorities above, note 3; *Holden v. Joy*, 17 Wall. 211, 243, 244; *Leavenworth Railroad Co. v. United States*, 92 U. S. 733; *Minter v. Shirley*, 45 Miss. 376; *Wood v. M. K. & T. R. Co.*, 11 Kansas, 323; 1 Kent Com. 258; 3 Id. 377 *et seq.*; *Commonwealth v. Roxbury*, 9 Gray, 451, 478; *Bell v. Gough*, 23 N. J. L. 624, 707.

⁴ *Ibid.*

ernments acting under the political powers conferred by the European nations, they were construed according to the laws of such nations. In 1685, the colonial assembly of Connecticut confirmed to proprietors, who had purchased from the Indians, lands which included an arm of the sea, with all islands, ponds, ways, "waters, watercourses, havens, ports, rivers, fishings," etc. This confirmation, though in itself a grant of title, did not convey the soil between high and low-water mark, the words above quoted being insufficient, by the common law, to convey such soil.¹ So, the title of the colonies to the shores and tide waters within their limits did not pass, under the colony patents, to the different towns which had purchased them from the Indians.² No obstacle was thus presented to the application of the common law in controversies respecting waters either tidal or inland. Nor did the fact that many parts of this country were claimed, and actually settled, by those who were strangers to the common law, prevent that system from becoming generally prevalent. In New York, which was settled by the Dutch, with whom the civil law prevailed, the province was claimed by right of discovery, when it passed into the possession of the English, and, being re-established as a British colony, the common law of England was applied in controversies respecting its waters.³ The common law, so far as it is not repugnant to the institutions and laws of the particular State, has become, either by right of discovery or by statute, the fundamental law throughout this country, except in Louisiana.⁴

¹ *East Haven v. Hemingway*, 7 Conn. 186, 200; *Middletown v. Sage*, 8 Conn. 221; *Jackson v. Porter*, 1 Paine C. C. 457; *Commonwealth v. Roxbury*, 9 Gray, 451, 478, 493. In the above case of *East Haven v. Hemingway*, Hosmer, C. J., while holding that the confirmation was a grant, added: "At the same time it must be admitted that the principal, if not the sole object of the grant, was to confirm to the proprietors the title to their lands purchased of the natives,

which they had not legal capacity to sell, and of which the proprietors had been in quiet possession for many years."

² *Church v. Meeker*, 34 Conn. 421, 428; *Seeley v. Brush*, 35 Conn. 423.

³ *Canal Commissioners v. People*, 5 Johns. 423, 445; *Cortelyou v. Van Brundt*, 2 Johns. 357; 1 Story on the Constitution, 136; *Smith's New Jersey Law*, 36, 37.

⁴ *Norris v. Harris*, 15 Cal. 226; *Waters v. Ross*, 12 Cal. 535; *Van*

§ 31. Under all the early governments in this country, whether charter, royal, or proprietary, the power to control and regulate their territorial and local interests was practically co-extensive and the same. No instance appears in which the Crown of England ever claimed, for its own benefit, any exclusive rights in the tide waters of these possessions, or in the soil under them. Although royal grants to individuals, for private purposes, include only what is expressly granted, and pass nothing by implication,¹ yet, in the case of a grant by the Crown of extensive foreign domains, where the obvious intent of the grant is not merely to vest the Crown's right of property in the grantees, but also to invest them with civil and political powers, and to establish complete though subordinate sovereignties, a different rule has been held applicable in this country. The grant of King James I., in November, 1620, to the council of Plymouth, upon the basis of which most of the others were framed, expressly named,² as included in the grant, not only the lands described, but also all havens, ports, rivers, waters, fishings, mines, etc., and all and singular other commodities, jurisdictions, royalties, privileges, franchises, and preëminences, both within the tract of land upon the main, and within the islands and seas adjoining; and, although such words as ports, rivers, waters, or fishings, are insufficient, in the case of a private grant, to convey the soil,³ yet the other words employed, and especially the word "royalties," in connection with the manifest purpose of the grant, were held to convey to the colonial governments

Maren v. Johnson, 15 Cal. 308; *Teschmacher v. Thompson*, 18 Cal. 11; *Reed v. Eldredge*, 27 Cal. 346; *Ward v. Mulford*, 32 Cal. 365; *Galveston v. Menard*, 23 Texas, 349; *Courand v. Vollmer*, 31 Texas, 400; *Franklin's Succession*, 7 La. Ann. 395, 418; *Reynolds v. Swain*, 13 La. Rep. 193; 1 Kent Com. 473, note; *Pollard v. Hagan*, 3 How. 212, 227.

¹ *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset v. Fogwell*, 5 B. & C. 884; *Boston v. Richardson*, 13 Allen, 146.

² See *Barker v. Bates*, 13 Pick. 255, 259.

³ *Wood's Case*, 1 Co. 46 b; 16 Vin. Abr. tit. Prerogative, K. § 27; *Chitty on the Prerogative*, 392; 2 Black. Com. 18; *Yelv.* 143; *Shep. Touch.* 97; *Com. Dig.* tit. Grant, E. 5; *East Haven v. Hemingway*, 7 Conn. 186, 200; *Middletown v. Gage*, 8 Conn. 221. The royal grant of the province of Maine, in 1639, to Sir Ferdinando Gorges, expressly included the right to wreck. See 3 Dane's Abr. 137.

the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters, and to invest them with such powers of legislation and administration as were necessary to advance the prosperity of the colonists. Such was the construction adopted by the Supreme Court of the United States,¹ and by the courts of Massachusetts,² New Jersey,³ and Connecticut.⁴ It is doubtless consonant to the law of England. Thus, in *Doe v. East India Co.*,⁵ before the Privy Council, it appears to have been conceded that the defendants, as representing the Indian government, had a freehold in the bed and shores of the navigable rivers of India. Upon this principle the colony of Massachusetts passed the ordinance of 1647, by which the seashores and flats of the colony, down to low-water mark, not exceeding one hundred rods from high-water mark, were made the property of the littoral proprietors. In *Brookhaven v. Strong*,⁶ in New York, a grant of an exclusive right to the soil and the oyster fisheries in an arm of the sea, which was made by the colonial government, and was ratified and confirmed by the colonial assembly, was held to be valid.

§ 32. At the time of the Revolution, when the people became sovereign, the respective States succeeded to the title of the Crown in the tide waters within their territorial limits, and to such rights therein as had been previously granted to the local governments established under the

¹ *Martin v. Waddell*, 16 Peters, 367; 3 Harr. (N. J.) 495; *Johnson v. McIntosh*, 8 Wheat. 595; *Fairfax v. Hunter*, 7 Cranch, 618; *Den v. Jersey City*, 15 How. 426; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, 457; *Bennett v. Boggs*, Bald. C. C. 60.

² *Barker v. Bates*, 13 Pick. 255; *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Roxbury*, 9 Gray, 451; *Boston v. Richardson*, 105 Mass. 351; *Storer v. Freeman*, 6 Mass. 435; *Parker v. Smith*, 17 Mass. 413; *Lapish v. Bangor Bank*, 8 Maine, 85; *Clancey v. Houdlette*, 39 Maine, 451.

³ *Arnold v. Mundy*, 1 Halst. 1; *Bell v. Gough*, 21 N. J. L. 156; 22 Id. 441; 23 Id. 624, 665; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532.

⁴ *Church v. Meeker*, 34 Conn. 421, 428; *State v. Sargent*, 45 Conn. 358, 372. See *East Haven v. Hemingway*, 7 Conn. 188; *Middletown v. Gage*, 8 Conn. 221; *Browne v. Kennedy*, 5 H. & J. 1; *Carson v. Blazer*, 2 Binney, 475.

⁵ 10 Moo. P. C. 140.

⁶ *Brookhaven v. Strong*, 60 N. Y. 56; 1 Thomp. & C. 415; *People v. Schermerhorn*, 19 Barb. 540.

royal sanction.¹ Public rights in navigable waters were not affected or impaired by this change of title, and the powers acquired by the States were those which, in England, and in this country previous to the Revolution, could have been exercised by the king alone, or by him in conjunction with Parliament.² It is apparent that the principles of the English law upon the subject have been much modified in this country.³ While in England there are rights of private property and of jurisdiction in the Crown, the public rights of navigation and fishery, which the Crown cannot impair,

¹ *Martin v. Waddell*, 16 Peters, 367; 3 Harr. 495; *Pollard v. Hagan*, 3 How. 212; *Howard v. Ingersoll*, 13 How. (U. S.) 381, 421; *New Orleans v. United States*, 10 Peters, 662; *Mumford v. Wardwell*, 6 Wall. 423, 436; *Smith v. Maryland*, 18 How. (U. S.) 74; *Withers v. Buckley*, 20 How. (U. S.) 84; *Barney v. Keokuk*, 94 U. S. 324; *McCready v. Virginia*, 94 U. S. 391, 394; 27 Gratt. 985; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Bennett v. Boggs*, 1 Bald. C. C. 60; *Arnold v. Mundy*, 1 Halst. 1; *Gough v. Bell*, 21 N. J. L. 156; 22 Id. 441; 23 Id. 624; *Attorney General v. Stevens*, Sax. 369; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532; *Paul v. Hazleton*, 37 Id. 106; *Attorney General v. Hudson Tunnel Co.*, 27 N. J. Eq. 176, 573; *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Alger*, 7 Cush. 53; *Weston v. Sampson*, 8 Cush. 347; *Lakeman v. Burnham*, 7 Gray, 437, 440; *Commonwealth v. Roxbury*, 9 Gray, 451 and note; *Nichols v. Boston*, 98 Mass. 39, 42; *Boston v. Richardson*, 105 Mass. 351; 13 Allen, 146; *Chapman v. Kimball*, 9 Conn. 40; *Simons v. French*, 25 Conn. 346; *Church v. Meeker*, 34 Conn. 421; *State v. Sargent*, 45 Conn. 358, 372; *Hollister v. Union Co.*, 9 Conn. 443; *Pitkin v. Olmstead*, 1 Root, 219; *Moulton v. Libbey*, 37 Maine, 472; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Clement v. Burns*, 43 N. H. 609; *Browne v. Kennedy*, 5 H. & J. 195;

Owings v. Norwood, 2 H. & J. 96; *Hall v. Gittings*, 2 Ibid. 112; *Cockey v. Smith*, 3 H. & J. 20; *Hutchings v. Talbott*, Id. 378; *Cunningham v. Browning*, 1 Bland, 299; *Matthews v. Ward*, 10 Gill & J. 443; *State v. Medbury*, 3 R. I. 138; *Chase v. American Steamboat Co.*, 9 R. I. 419, 427; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348; *Ball v. Slack*, 2 Whart. 508, 539; *Stover v. Jack*, 60 Penn. St. 339; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Rogers v. Jones*, 1 Wend. 261; *People v. New York Ferry Co.*, 68 N. Y. 71; *Towle v. Remsen*, 70 N. Y. 303, 308; *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522; *Smith v. Levinus*, 8 N. Y. 472; *Mahler v. Norwich Transportation Co.*, 35 N. Y. 352; *People v. Tibbetts*, 19 N. Y. 523; *People v. Vanderbilt*, 26 N. Y. 287; *Hudson River Railroad Co. v. Loeb*, 7 Rob. 418.

² Ibid.

³ *Martin v. Waddell*, 16 Peters, 369; *Barney v. Keokuk*, 94 U. S. 324; *Clement v. Burns*, 43 N. H. 609; *Providence Steamship Co. v. Providence Steam Engine Co.*, 12 R. I. 356; *Church v. Meeker*, 34 Conn. 428; *Arnold v. Mundy*, 1 Halst. 1; *Boston v. Richardson*, 105 Mass. 362; *Moulton v. Libbey*, 37 Maine, 472; *Ward v. Willis*, 6 Jones L. 183, 185; *Martin v. O'Brien*, 34 Miss. 21; *Eldridge v. Cowell*, 4 Cal. 80.

and the power of Parliament to regulate these public rights, there are here no rights but those of the public on the one hand and of individuals on the other.¹ For this purpose, the State represents the people, and the ownership is that of the people in their united sovereignty.² Thus, in *Pollard v. Hagan*,³ the Supreme Court of the United States said: The State's "rights of sovereignty and jurisdiction are not gov-

¹ *Ibid.*; *Clement v. Burns*, 43 N. H. 609, 617, 619.

² *McCready v. Virginia*, 94 U. S. 391, 394. The case of *Martin v. Waddell*, 16 Peters, 369, was an action of ejectment for the recovery of certain land covered with water below low-water mark in Raritan Bay in the State of New Jersey. The plaintiffs claimed a private and exclusive title to the land (1) under the letters-patent of King Charles II. in 1664 to the Duke of York, which conveyed to the latter a part of New England, &c., and "the lands from the west side of Connecticut to the east side of Delaware Bay," and various islands along the coast, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings, and fowlings, and all other royalties, profits, commodities, and hereditaments to said several islands, lands, and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim, and demand, of, in, or to the said lands and premises, or any part or parcel thereof," &c.; (2) under various conveyances, and deeds of confirmation from the Duke of York and the Crown, by which the part of the province of New Jersey, called East New Jersey, of which the land in suit was part, became vested in twenty-four proprietors with the same rights and title previously conveyed to the Duke of York. In 1702 the proprietors surrendered to Queen Anne only the powers of government

in the province; and the question was whether after this surrender the proprietors or their grantees, under whom the plaintiffs claimed, retained any private title in the soil covered by tide waters. In answering this question in the negative, and deciding that the surrender was as broad as the original grants, the majority of the Court regarded the dominion and property of the Crown in tide waters as entrusted to the King only for the common benefit of his subjects, and held that "the land under the navigable waters passed to the grantee as one of the royalties incident to the power of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." Of the two judges who dissented, Thompson, J., delivered an opinion in which he maintained that, under the letters-patent, the Duke of York, and afterwards the proprietors of New Jersey, acquired the right and title of the Crown in the soil as well as the powers of government, and that the proprietors "surrendered nothing but the mere powers of government granted by the charter, retaining unaffected in any manner whatever the right of private property." See *New Orleans v. United States*, 10 Peters, 662; *Den v. Jersey City*, 15 How. 426; *Smith v. Maryland*, 18 How. 71, 74, 75; *Barney v. Keokuk*, 94 U. S. 324; *Yates v. Milwaukee*, 10 Wall. 497, 504; *Dutton v. Strong*, 1 Black, 23, 31; *McCready v. Virginia*, 94 U. S. 391.

³ 3 How. 212, 229.

erned by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions." In *Bell v. Gough*,¹ in New Jersey, Elmer, J., said: "The prerogative of the Crown, so far as it gave to the king the shores of the sea and of navigable rivers, rather as private property than as a sovereign right for the protection of the public, was not applicable to a distant province; and, indeed, the exercise of it, so as to require in all cases a license to prevent him from seizing and abating or renting at his pleasure structures on the shores or marshes reclaimed from the tide, whether there was or was not an obstruction of the navigation, could not but have been considered as an intolerable grievance, and, had it been commonly insisted on, would not have failed prominently to appear among the oppressive acts which occasioned and justified the Revolution. According to the reasoning of Chief Justices Kirkpatrick and Taney, in *Arnold v. Mundy*,² and *Martin v. Waddell*,³ the king never granted to the proprietors of the province his *jus privatum* in the shores and soil of the navigable waters, but only that *jus publicum* which was essential to the powers of government. That the *jus publicum*, or, in other words, the sovereign right of jurisdiction over them, is vested in the government of the State, and is ample for the protection of the public right of navigation and of all other public rights, is undoubted. There is no evidence that the *jus privatum*, the right of private property in the shore to low-water mark, was ever asserted in the colony as a right of the Crown, or that it has until recently been claimed by the State; but there is, on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the adjoining land from the first settlement of the province, and exercised by them to the present day, so as to have become a common right, and thus the common law. What was the origin of the usage, it may be difficult to say. If it be conceded that it arose from a mistaken apprehension of the doctrines of the English common law, or from what must now be admitted to have been a mistaken construction of

¹ 23 N. J. L. 624, 661.² 1 Halst. 1.³ 16 Peters, 369.

the original grants to the first proprietors, I do not see that this concession will materially influence the result. The mistake was universal, and was acted on throughout the States." In *Providence Steam Engine Co. v. Providence Steamship Co.*,¹ in Rhode Island, Potter, J., said: "In all questions relating to our shores, a very important preliminary consideration is, whether the English common law upon this subject was ever adopted here in its full extent. By the patent of 1643, the laws were to be 'conformable to the laws of England so far as the nature and constitution of the place will admit.' . . . The charter of 1663 used substantially the same language as the patent of 1643. . . . To apply the common-law doctrine strictly would require us to hold that all the marshes in the State belong to the State; yet from the very first settlement, although flowed by the tide, they have always been recognized as private property, platted and sold as such, taxed as such, and the State has made provision by statute for exempting them from the fence laws, for the very reason that they are overflowed by the tides. . . . The true doctrine seems to be, as the result of the decisions, that the State has the governmental control of the shores and tide waters for the benefit of the public, in order to protect the public rights of passage or other rights on the shore, and to protect the navigation. . . . During our Revolutionary War, and the distressful times which followed it, if the State had owned the fee of this valuable property, it could not have escaped a sale. Town treasurers were committed to jail for the non-payment of nearly every State tax that was ordered, and yet no town nor person ever thought of this as a property which the State owned in fee, or could sell to lessen taxation. To hold that the State holds the fee of the shore, in such a sense that it can sell all the shores, would deprive nearly half of the land in this small State of a large portion of its value derived from bounding on the shore."

§ 33. The rights of the respective States, with respect to the navigable waters within their limits, were restricted by

¹ 12 R. I. 348, 356.

certain powers of jurisdiction and control conferred upon Congress by the Federal Constitution, but the property itself was not granted to the general government. The powers thus ceded to the United States include: First, The right of jurisdiction by its courts, as defined and regulated by Congress, in admiralty and maritime causes arising upon the high seas or upon navigable waters within the limits of a State, and accessible to vessels from other States;¹ Second, The power to regulate commerce with foreign nations and among the several States.² The powers thus conferred upon Congress are distinct, having no necessary connection with each other, and being conferred in the constitution by separate grants.³ Neither of them is absolutely exclusive of State authority. In causes of admiralty and maritime jurisdiction, the right of a common-law remedy is expressly saved to suitors where the common law is competent to give it;⁴ and, if Congress has not excluded State legislation, the State courts retain concurrent jurisdiction in maritime cases, where, previous to the constitution, they had jurisdiction of the subject-matter.⁵ So the commerce clause of the constitution does not make nugatory legislation by a State which affects commerce and does not interfere with the existing regulations of Congress upon the same subject.⁶ The admiralty jurisdiction does not

¹ U. S. Const. art. 3, § 2; U. S. Rev. Stats. § 563. The *Genesee Chief*, 12 How. 443; *Fretz v. Bull*, 12 How. 466; *United States v. Bevans*, 3 Wheat. 336; *Allen v. Newberry*, 21 How. 244; *Maguire v. Card*, Id. 248; *Jackson v. The Magnolia*, 20 How. 296; *Waring v. Clark*, 5 How. 441; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *Leon v. Galceran*, 11 Wall. 185; *The Lottawanna*, 21 Wall. 558; *Barney v. Keokuk*, 94 U. S. 324; *The Commerce*, 1 Black, 574. Artificial canals, when channels of international commerce, are within the jurisdiction of the admiralty. *Scott v. The Young America*, 1 Newb. Adm. 101, 193; *The*

Oler, 2 Hughes, 12; *The Avon*, 1 Brown Adm. 170.

² U. S. Const. art. 1, § 8; *Hallet v. Novion*, 14 Johns. 273; *Percival v. Hickey*, 18 Johns. 257.

³ *The Commerce*, 1 Black, 574, 579; *The Belfast*, 7 Wall. 624.

⁴ U. S. Rev. Stats. § 563; *Edwards v. Elliott*, 21 Wall. 532; *United States v. Bevans*, 3 Wheat. 336.

⁵ *Reynolds v. The Favorite*, 10 Minn. 242; *Morin v. The F. Sigel*, Id. 250; *Bohannon v. Hammond*, 42 Cal. 227.

⁶ *Gibbons v. Ogden*, 9 Wheat. 1; *Pound v. Turck*, 95 U. S. 459, 463; *Gilman v. Philadelphia*, 3 Wall. 713; *Corfield v. Coryell*, 4 Wash. 371, 378; *Wilson v. Blackbird Creek Co.*, 2 Peters, 245; *Crandall v. Nevada*, 6

extend to injuries sustained on land, as where a wharf or elevator is injured by a collision with, or a fire originating upon, a vessel,¹ although it includes injuries to vessels caused by illegal obstructions in navigable waters;² and claims for wharfage.³ But the power to regulate commerce extends to acts done on land which interfere with commerce or navigation.⁴

§ 34. The right of Congress to regulate commerce includes the power to regulate navigation upon the navigable waters of the United States, and to keep such waters open and free for the purposes of intercourse with foreign nations and between different States.⁵ The navigable waters of the United States are those which, whether fresh or salt, form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which commerce is, or may be, carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.⁶ The power of Congress upon this subject does

Wall. 35; *Cox v. State*, 3 Blackf. 197; *People v. St. Louis*, 10 Ill. 350; *Ingraham v. Chicago Railroad Co.*, 34 Iowa, 249; 1 Kent Com. 439.

¹ *The Plymouth*, 3 Wall. 20; *The Rock Island Bridge*, 6 Wall. 213; *United States v. Winchester*, 99 U. S. 372; *The Maud Webster*, 8 Ben. 547; *The Ottawa*, 5 Am. L. T. Rep. 147; *The Mary Stewart*, 8 So. L. Rev. 2.

² *Northwestern Union Packet Co. v. Atlee*, 2 Dillon, 479; 21 Wall. 389; *The Mohler*, 21 Wall. 230; *The Lady Pike*, 21 Wall. 1; *King v. American Transportation Co.*, 1 Flippin, 1.

³ *Ex parte Easton*, 95 U. S. 68; *The Kate Tremaine*, 5 Ben. 60; *Union Wharf Co. v. Steamer Starin*, 45 Conn. 585.

⁴ *United States v. Coombs*, 12 Pet. 72.

⁵ *Gibbons v. Ogden*, 9 Wheat. 1, 193; *United States v. Coombs*, 12 Pet. 72; *Smith v. Turner*, 7 How. 392, 401; *Veazie v. Moor*, 14 How. 568; *Withers*

v. Buckley, 20 How. 84; *The Passenger Cases*, 7 How. 283; *Pound v. Turck*, 95 U. S. 459; *The Passaic Bridges*, 3 Wall. 782; *County of Mobile v. Kimball*, 102 U. S. 691; *Railroad Co. v. Richmond*, 19 Wall. 584; *The Montello*, 20 Wall. 430; *Gilman v. Philadelphia*, 3 Wall. 713, 724; *The Daniel Ball*, 10 Wall. 557, 564; 1 Kent Com. 439; *Pollard v. Hagan*, 3 How. 212, 229; *The Bright Star*, 1 Woolw. 266; *Rogers v. Cincinnati*, 5 McLean, 337; *The Brig Wilson*, 1 Brock. 423; *The Chusan*, 2 Story, 456; *Navigation Co. v. Dwyer*, 29 Texas, 376. The power given to Congress to regulate commerce does not, it seems, include the regulation of navigation with the Indians. *Moor v. Veazie*, 32 Maine, 343.

⁶ *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *Gilman v. Philadelphia*, 3 Wall. 713, 724; *South Carolina v. Georgia*, 93 U. S. 4; *Mobile Co. v. Kimball*,

not stop at the boundaries of the States, and, when exercised, is exclusive of State authority.¹ If it authorizes the obstruction of public navigable waters, its action is conclusive as to the extent to which the public interests will be promoted by the interference with, or termination of, the navigation.² It possesses all powers necessary to the protection and improvement of the channels of intercourse;³ the right to declare what shall or shall not be deemed an illegal obstruction of navigation, either before or after its erection or condemnation as a nuisance,⁴ and the power to close one of several channels in a navigable river, in order to make the others more useful for navigation.⁵ The methods approved by Congress for the improvement of a harbor prevail, in case of conflict with State legislation upon the same subject.⁶ The commercial power of Congress over the Savannah River is not restricted by the compact between the States of South Carolina and Georgia prior to the adoption of the Federal Constitution, which provided that the northern branch of the river should

102 U. S. 691; *Lord v. Steamship Co.*, Id. 541; *Wilson v. Blackbird Creek Marsh Co.*, 2 Peters, 245; *New York v. Miln*, 11 Peters, 102, 149; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; 18 Id. 421; *Gilman v. Philadelphia*, 3 Wall. 713; *Silliman v. Hudson River Bridge Co.*, 2 Wall. 403; 1 Black, 582; 4 Blatch. 74, 395; *Hinson v. Lott*, 8 Wall. 148; *United States v. Duluth*, 1 Dillon, 469; *United States v. Coombs*, 12 Peters, 72; *Pound v. Turck*, 95 U. S. 459; *Cannon v. New Orleans*, 20 Wall. 577; *Henderson v. New York*, 92 U. S. 258; *Crandall v. Nevada*, 6 Wall. 35; *United States v. Holliday*, 3 Wall. 417; *Morse v. Home Ins. Co.*, 30 Wis. 496.

¹ *Sinnott v. Davenport*, 22 How. 227; *Sherlock v. Alling*, 93 U. S. 99; *Halderman v. Beckwith*, 4 McLean, 286.

² *Miller v. Mayor*, 13 Blatch. 469; *People v. Kelly*, 76 N. Y. 475.

³ *South Carolina v. Georgia*, 93 U. S. 4; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96

U. S. 1; *Works v. Junction Railroad Co.*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517.

⁴ *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *South Carolina v. Georgia*, 93 U. S. 4; *Gibbons v. Ogden*, 9 Wheat. 196; *Gilman v. Philadelphia*, 3 Wall. 713; *The Passenger Cases*, 7 How. 283, 394; *People v. Brooks*, 4 Denio, 469. When Congress legislates, it suspends, but does not necessarily repeal, the State law. *Sturgis v. Spofford*, 45 N. Y. 446; 52 Barb. 436; *Henderson v. Spofford*, 59 N. Y. 131; *Ex parte McNeil*, 13 Wall. 236; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 244; *Sherlock v. Alling*, 93 U. S. 99.

⁵ *Ibid.*; *South Carolina v. Georgia*, 94 U. S. 4.

⁶ *Wisconsin v. Duluth*, 96 U. S. 379; 2 Dillon, 406; *United States v. Duluth*, 1 Dillon, 469; *South Carolina v. Georgia*, 93 U. S. 4; *post*, c. 4.

be the boundary between them, and that the navigation along a specified channel of the river should be forever free to the citizens of both States, and exempt from interruption by either State.¹

§ 35. Under the Constitution of the United States, a State has the right, if its legislation does not conflict with the action of Congress upon the same subject, to authorize bridges and dams across the navigable waters within its limits;² to license wharves, piers, and docks intruding upon such waters;³ to establish harbor lines to which wharves may be extended;⁴ to prescribe the places and manner in which vessels may lie in a harbor, and what lights they are to carry at night;⁵ to

¹ *South Carolina v. Georgia*, 93 U. S. 4. An agreement between Maryland and Pennsylvania to preserve the free navigation of the Susquehanna River is not infringed by a statute of one of these States prohibiting the floating of loose logs, inasmuch as this makes the navigation safe and convenient, and prevents it from being monopolized by individuals. *Craig v. Kline*, 65 Penn. St. 399.

² *Wilson v. Blackbird Creek Marsh Co.*, 2 Peters, 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Crandall v. Nevada*, 6 Wall. 35; *Pound v. Turck*, 95 U. S. 459; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *Northern Pacific Railroad Co. v. Barnesville Railroad Co.*, 2 McCrary, 224; *Silliman v. Hudson River Bridge Co.*, 2 Wall. 403; 1 Black, 582; 4 Blatch. 74, 395; *Albany Bridge Case*, 2 Wall. 403; *The Passaic Bridges*, 3 Wall. 782; *Griffing v. Gibb*, 1 McAll. 212; *Commonwealth v. Breed*, 4 Pick. 460; *Silliman v. Troy Bridge Co.*, 11 Blatch. 274; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *United States v. New Bedford Bridge*, 1 Wood. & M. 401; *People v. Renselaer Railroad Co.*, 15 Wend. 113; *Savannah v. Georgia*, 4 Ga. 26; *Bailey v. Philadelphia Rail-*

road Co., 4 Harr. (Del.) 389; *Flanagan v. Philadelphia*, 42 Penn. St. 219.

³ *Post*, c. 4; *Savannah v. State*, 4 Ga. 26; *Delaware Canal Co. v. Lawrence*, 2 Hun, 163; *United States v. Bain*, 3 Hughes, 593.

⁴ *Post*, c. 4.

⁵ *Cooley v. Board of Wardens*, 12 How. 299; *The New York v. Rea*, 18 How. 223; *The James Gray v. The John Fraser*, 21 How. 184; *Sinnot v. Davenport*, 22 How. 227; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236; *Peete v. Morgan*, 19 Wall. 589; *Railroad Co. v. Husen*, 95 U. S. 465; *Foster v. Master*, 94 U. S. 246; *Mobile Co. v. Kimball*, 102 U. S. 691; *Osborne v. Mobile*, 16 Wall. 479; *Chicago Railroad Co. v. Fuller*, 17 Wall. 560; *The America*, 1 Lowell, 177; *Banta v. McNeil*, 5 Ben. 74; *Sproul v. Hemingway*, 14 Pick. 1; *Neilson v. Garza*, 2 Woods, 287; *Higgins v. Lime*, 130 Mass. 1; *The California*, 1 Sawyer, 463; *The Panama*, *Deady*, 27; *Master v. Prats*, 10 Rob. (La.) 459; *Portwardens v. Ship M. J. Ward*, 14 La. Ann. 289; *Portwardens v. Ship C. Morgan*, Id. 595; *People v. Sperry*, 50 Barb. 170; *Stilwell v. Raynor*, 1 Daly, 47; *Hunt v. Card*, 14 Pick. 135. An act authorizing harbor masters to regulate

pass reasonable quarantine and inspection laws, and pilotage, or port regulations;¹ to improve the navigability of its waters, and to authorize the collection of tolls in consideration of such improvements.² Either of two States, bordering upon navigable waters leading to the sea, may license pilots, and enact pilotage regulations, but cannot exclude pilots licensed by the other State, even from those parts of such waters and those ports which are within its own territorial limits.³ The improvement, by the States, of the navigable waters within their respective limits, will not be permitted to impair their free navigation under the laws of Congress; but the inaction of Congress in such matters amounts to an assent to the exercise of State authority so long as such inaction continues.⁴ The State, or those acting under its authority, cannot lay tonnage duties,⁵ or

and station vessels, and imposing a penalty for violation of their orders, is a valid police regulation. *Vanderbilt v. Adams*, 7 Cowen, 349; *Commissioners v. Clark*, 33 N. Y. 251; *Patterson v. Kentucky*, 97 U. S. 501; *Simpson's Appeal*, 77 Penn. St. 270. So is an act of the State legislature regulating the speed of steamboats while passing the wharves of a city. *People v. Jenkins*, 1 Hill (N. Y.) 469. And a state statute defining what lights shall be carried on its internal waters, may continue in force, notwithstanding subsequent legislation by Congress on the same subject. *Fitch v. Livingston*, 4 Sand. (N. Y.) 492. The pilot laws of a State may fix the compensation of pilots beyond the State boundaries. *The Nevada*, 7 Ben. 386; *Horton v. Smith*, 6 Ben. 264; *The Traveller*, Id. 280; *Wilson v. Mills*, 10 Abb. Pr. n. s. 143; 4 Daly, 549. The exercise by the States of the power to regulate pilotage does not withdraw it from the admiralty jurisdiction of the district courts. *Cooley v. Board of Wardens*, 12 How. 299; *Ex parte McNeil*, 13 Wall. 236; *The Lottawanna*, 21 Wall. 558, 581.

¹ *The James Gray v. The John Frazier*, 21 How. 184.

² *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Chicago v. McGinn*, 51 Ill. 266, 273; *Cannon v. New Orleans*, 20 Wall. 577; *Palmer v. Cuyahoga Co.*, 3 McLean, 226; *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *McReynolds v. Smallhouse*, 8 Bush, 447; *Kellogg v. Union Co.*, 12 Conn. 7; *Benjamin v. Manistee River Improvement Co.*, 42 Mich. 628; *Nelson v. Cheboygan Slack-water Navigation Co.*, 44 Mich. 7.

³ *The Clymene*, 24 Alb. L. Journ. 491.

⁴ *Mobile v. Kimball*, 102 U. S. 691.

⁵ *Inman Steamship Co. v. Tinker*, 94 U. S. 238; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Steamship Co. v. Portwardens*, 6 Wall. 31; *Crandall v. Nevada*, 6 Wall. 35; *State Tonnage Tax Cases*, 12 Wall. 204; *Pecte v. Morgan*, 19 Wall. 581; *Cannon v. New Orleans*, 20 Wall. 577; *Hackley v. Geraghty*, 34 N. J. L. 332; *John Kyle Steamboat Co. v. New Orleans*, 23 Int. Rev. Rec. 19.

taxes upon the transportation of passengers;¹ or imposts or duties upon exports and imports.² Wharfage charges, imposed on vessels as an equivalent for the benefits and facilities furnished to them in mooring and landing cargoes, are not within these prohibitions, even though the vessels are enrolled and licensed under the acts of Congress, and the rates are proportioned to their tonnage;³ but one State cannot, under the pretence of exacting wharfage dues, build up its domestic commerce by means of oppressive burdens upon the industry and business of other States.⁴ A State may also authorize enrolled and licensed steamboats, plying between different ports upon a river, to be taxed as personal property by the city which is their home port, and in which the company owning them has its principal office.⁵ So, it may provide a remedy *in personam* for injuries caused by the negligence of a common carrier upon the bays and rivers within its territorial jurisdiction, and the law giving such remedy is not invalid as a hindrance to the free exercise of the license to vessels navigating such waters under the acts of Congress.⁶ It may regulate the manner of rafting and driving logs down its rivers,⁷ and may incorporate companies, with power to

¹ *Smith v. Turner*, 7 How. 283; 4 Denio, 475, n.; *New York v. Miln*, 11 Pet. 102; *Groves v. Slaughter*, 15 Pet. 449; *Railroad Co. v. Maryland*, 21 Wall. 456; *Chy Lung v. Freeman*, 92 U. S. 275; *Henderson v. New York*, 92 U. S. 259; *Norris v. Boston*, 7 How. 283; 4 Met. 282.

² *Brown v. Maryland*, 12 Wheat. 419; *The License Cases*, 5 How. 504; *Nathan v. Louisiana*, 8 How. 73; *Mager v. Grima*, Id. 490; *Aguirre v. Maxwell*, 3 Blatch. 140; *Clarke v. Clarke*, 3 Woods, 408.

³ *Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 4 Dillon, 10, 18, n.; *The Ann Ryan*, 7 Ben. 20; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196; *Worsley v. 2d Municipality*, 9 Rob. (La.) 324; *Schwartz v. Flatboats*, 14 La. Ann. 243; *Eller-*

man v. McMains, 30 La. Ann. 190; *1st Municipality v. Pease*, 2 La. Ann. 538; *Cannon v. New Orleans*, 20 Wall. 577; 27 La. Ann. 16; *Leathers v. Aiken*, 25 Alb. L. Journ. 254; *Sterrett v. Houston*, 14 Texas, 153. See *Northwestern Co. v. St. Paul*, 3 Dill. 454.

⁴ *Guy v. Baltimore*, 100 U. S. 434; *The John M. Welch*, 18 Blatch. 51; *Webb v. Dunn*, 18 Fla. 721.

⁵ *Transportation Co. v. Wheeling*, 99 U. S. 273; *The North Cape*, 6 Biss. 505; *People v. Commissioners*, 48 Barb. 157.

⁶ *Steamboat Co. v. Chase*, 16 Wall. 522; 9 R. I. 419; *Sherlock v. Alling*, 93 U. S. 99; 44 Ind. 184.

⁷ *Scott v. Wilson*, 3 N. H. 321; *Craig v. Kline*, 65 Penn. St. 399; *Harrigan v. Connecticut River Lumber Co.*, 120 Mass. 580; *Treat v. Lord*, 42 Maine, 552; *Mandlebaum v. Russell*,

convert unnavigable into navigable streams, and to levy tolls on vessels or logs passing them, or to improve the navigation of streams partially navigable;¹ but it cannot authorize the imposition of tolls for the passage of logs to other States, upon waters the navigation of which it has not improved.² It cannot grant exclusive rights of navigation upon waters which are channels of intercourse between different States;³ but it may grant such rights upon lakes which are wholly within its limits, and not accessible from other States, and upon those parts of rivers from which, by reason of rocks, or other obstructions, inter-state communication is excluded.⁴ The power to establish and regulate ferries is subject to the control of the States, and not of the general government;⁵ and, in the case of boundary rivers, like the Mississippi, a ferry franchise conferred by a single State is valid without the concurrent sanction either of Congress or of the State which bounds upon the opposite side of the river, or the right of landing beyond the limits of the State by which the grant is made.⁶

¹ Nev. 551; *Mason v. Boom Co.*, 3 Wall. Jr. 252.

² *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430; *Commissioners v. Green River Navigation Co.*, 79 Ky. 73; *post*, c. 4.

³ *Carson R. L. Co. v. Patterson*, 33 Cal. 334. See *Conley v. Chedic*, 7 Nev. 336.

⁴ *Gibbons v. Ogden*, 9 Wheat. 1, reversing *s. c.* 17 Johns. 488; and overruling *Livingston v. Van Ingen*, 9 Johns. 507; *North River Steamboat Co. v. Livingston*, 3 Cowen, 713; *Hopk. Ch.* 149; *Ogden v. Gibbons*, 4 Johns. Ch. 174; *United States v. Morrison*, 4 New York Leg. Obs. 333; *United States v. Jackson*, Id. 450.

⁵ *Veazie v. Moor*, 14 How. 568; *Withers v. Buckley*, 20 How. 84; *Moore v. American Transportation Co.*, 24 How. 1, 36; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Moor v. Veazie*, 32 Maine, 343; 31

Maine, 360; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *The Bright Star*, Woolw. 266.

⁶ *Conway v. Taylor*, 1 Black, 603; *Gibbons v. Ogden*, 9 Wheat. 1, 214; *Fanning v. Gregoire*, 16 How. 534; *Hall v. De Cuir*, 95 U. S. 485, 488; *Elizabethport Ferry Co. v. United States*, 5 Blatch. 198; *United States v. The James Morrison*, 1 Newb. 241, 257; *United States v. The William Pope*, Id. 256; *People v. Rabcock*, 11 Wend. 506; *People v. T. R. Co.*, 19 Wend. 113; *Freeholders v. New Jersey*, 4 Zab. 718; *Columbia Bridge Co. v. Geisse*, 38 N. J. L. 39, 580; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Chilvers v. People*, 11 Mich. 43; *Jones v. Fanning*, Morris (Iowa), 348; *Burlington Ferry Co. v. Davis*, 48 Iowa, 133; *Alb. L. J.* June 16, 1883.

⁶ *Ibid.*; *Marshall v. Grimes*, 41 Miss. 27. As to the right of ferriage over a river forming a national boundary, and its suspension during war between

§ 36. The State may grant to individuals or corporations the soil of public navigable waters¹ or exclusive rights of fishery in them.² If the terms of the grant are doubtful, that construction will be adopted which least restricts the rights of the State and of the public, inasmuch as public grants, whether made by the Crown, or by Congress, or by a State, are construed strictly, and pass only what appears by express words or necessary implication.³ When the legislature provides for the sale or occupation of lands owned by the State and adjacent to tide water, an express declaration is necessary to warrant the inference that it was intended to permit the shore below high-water mark to be converted into private property.⁴ A statute which extends the bounds of a town over tide waters, so as to include certain islands therein, confers jurisdiction only, and conveys no right of property in the soil under the water.⁵ A confirmation

the nations on opposite sides of the stream, see *Ogden v. Lund*, 11 Texas, 688; *Prather v. New Orleans*, 24 La. Ann. 42. The commissioners of either of two countries bounding upon a river may license a ferry across it. *Jones v. Johnson*, 2 Ala. 746.

¹ *Commonwealth v. Alger*, 7 Cush. 53; *Arnold v. Mundy*, 1 Halst. 1; *Bell v. Gough*, 23 N. J. L. 624; *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631; *Hudson Tunnel Co. v. Attorney General*, Id. 176, 573; *Galveston v. Menard*, 23 Texas, 349.

² *Post*, c. 4.

³ *Royal Fishery of the Banne, Davies*, 149; *Somerset v. Fogwell*, 5 B. & C. 875; *The Rebekah*, 1 Rob. Adm. 227, 230; *Feather v. The Queen*, 6 B. & S. 257; *Attorney General v. Farmer*, Sir T. Raym. 241; 2 Lev. 171; *Bro. Abr. Patent*, pl. 62; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, 544, 557; *Leavenworth Railroad Co. v. United States*, 92 U. S. 733; *Minturn v. Larue*, 23 How. 435; 1 McAll. 370; *Rice v. Railroad Co.*, 1 Black, 358; *Boston v. Richardson*, 13 Allen, 146; 105 Mass. 351; *Com-*

missioners v. Holyoke Water Power Co., 104 Mass. 446, 449; *People v. New York Ferry Co.*, 68 N. Y. 71; *People v. Canal Appraisers*, 33 N. Y. 461; *Clark v. Reeves*, 3 Caines, 293; *Lansing v. Smith*, 4 Wend. 9; 8 Cowen, 46; *Morris Canal Co. v. Central Railroad Co.*, 16 N. J. L. 419; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *West Branch Canal Co. v. Elmira Railroad Co.*, 55 Penn. St. 180; *McManus v. Carmichael*, 3 Iowa, 1; *La Plaisance Bay Co. v. Monroe*, Walk. Ch. 155; *Haight v. Keokuk*, 4 Iowa, 200; *North-Western Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *Mills v. St. Clair County*, 2 Gilman, 198; 8 How. 569; *Vansickle v. Haines*, 7 Nev. 249. See *Hyman v. Reed*, 13 Cal. 444. So a grant from the sovereign of the right to take toll is construed against the grantee. *Stourbridge Canal v. Wheeley*, 2 B. & A. 793; *Britain v. Cromford Canal*, 3 B. & Ald. 140; *Leeds Canal v. Huster*, 1 B. & C. 424; *Woolrych on Waters*, 306, 312.

⁴ *Kimball v. Macpherson*, 46 Cal. 103.

⁵ *Palmer v. Hicks*, 6 Johns. 133;

by a colonial assembly to proprietors, who had purchased from the Indians, of lands which included an arm of the sea, with all ports, rivers, etc., was held not to be a grant of the soil between high and low-water mark.¹ So, a general authority conferred by the legislature to lay out highways will not authorize the laying out of a highway over navigable waters.² A conveyance by the State of all its right, title, and interest in and to the bed of a navigable river does not authorize a destruction or exclusive use of the navigation;³ and if the legislature confers upon a railroad company power to construct its road "along" tide water, this does not authorize the construction of the road below high-water mark.⁴ So, a charter to a mill corporation, authorizing it to exclude tide water from flats belonging to the State, and to use them as a basin for the purpose of mill

People v. Schermerhorn, 19 Barb. 540. This was an action of debt for a penalty prescribed by the town of Flushing against any person raking clams within its boundaries, and the regulation prescribing the penalty was held to be illegal and void. The court said that the statute by which the bounds of the town were extended over the bay and into the Sound, so as to include the islands southward to the main channel, was merely for the purpose of jurisdiction and no evidence of a grant of property in the soil covered by the water, and that the town must show such right of property in order to entitle it to regulate the use of such lands. It was also said: "All the ground, under the navigable waters of the Hudson River, is within the boundaries of some town, for the purposes of civil and criminal jurisdiction; but it does not follow that the lands under the water belong to the town situated on the river." In *Commonwealth v. Roxbury*, 9 Gray, 451, 594, Shaw, C. J., said: "Counties are composed of towns. And for many purposes, the body of the county extends not only

over the shores of the sea, but to some distance below the ebb of the tide, for many purposes of civil and criminal proceedings, and for certain purposes of jurisdiction; and, for the like purposes, towns may be considered as having a coextensive jurisdiction; but this has no bearing upon the question of property. An act of incorporation, therefore, without words of grant of the soil, would vest no part of the property of the government in such town. Nor was the purpose of the organization of such a nature as would require of the government any portion of the public right vested in them for public use and benefit; therefore, no portion of the *jus publicum* will be presumed to have been granted without express words."

¹ *East Haven v. Hemingway*, 7 Conn. 186; *Middletown v. Sage*, 8 Conn. 221; *Commonwealth v. Roxbury*, 9 Gray, 493, 494.

² *Post*, c. 4.

³ *Treat v. Lord*, 42 Maine, 552.

⁴ *Stevens v. Erie Railway Co.*, 21 N. J. Eq. 259; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532.

power, does not release the title of the State to the flats.¹ State laws providing for the entry and sale of public lands, or for the sale of swamp and overflowed lands, do not extend to the soil beneath navigable waters, and no right to obstruct the navigation passes to the purchaser under such laws.² In *Attorney General v. Hanmer*,³ letters patent of the Crown, as lord of the manor of Englefield, granting "all those coal mines found or to be found within the commons, waste grounds, or marshes within the said lordship of Englefield," with a proviso that the grant should be construed strictly against the Crown, and most strictly and beneficially for the grantees, was held to pass coal lying under the foreshore of the estuary of the River Dee, between high and low-water marks, and forming part of the manor of Englefield.

§ 37. Individuals may also acquire by prescription, against the Crown or the State, the right to the soil of public waters;⁴ and, by the weight of authority, they may gain, in the same way, exclusive rights of fishery in them.⁵ When the shores or flats of tide waters have become private property, the

¹ *Commonwealth v. Roxbury*, 9 Gray, 451.

² *Chapman v. Hoskins*, 2 Md. Ch. 485; *People v. Morrill*, 26 Cal. 336; *Taylor v. Underhill*, 40 Cal. 471; *Tatum v. Sawyer*, 2 Hawks (N. C.) 226; *Smith v. Ingram*, 7 Ired. 175; *Freytag v. Powell*, 1 Whart. 536; *Barton v. Bouvier*, 1 Phila. 523; *Brandt v. McKeever*, 18 Penn. St. 70; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194; *Storer v. Jack*, 60 Penn. St. 339; *Allegheny City v. Moorehead*, 80 Penn. St. 118; *Philadelphia v. Scott*, 81 Penn. St. 80; *Hinman v. Warren*, 6 Oregon, 408; *Norfolk City v. Cooke*, 27 Gratt. 430. If the stream of a public navigable river is artificially diverted from its channel, the land reclaimed cannot be appropriated by warrant and survey. *Poor v. McClure*, 77 Penn. St. 214; *Wainwright v. McCullough*, 63 Penn. St. 66; *Allegheny City v. Moorehead*, 80 Penn.

St. 118. In *People v. Morrill*, 26 Cal. 336, land containing asphaltum between high and low-water mark on the Pacific Ocean, was treated as open to location of mining claims under the general law the same as other lands of the State. See, also, *More v. Massine*, 37 Cal. 432.

³ 27 L. J. Ch. 837.

⁴ *Hale, De Jure Maris*, c. 5; *Hargrave's Law Tracts*, 18; *Nichols v. Boston*, 98 Mass. 39; *Boston v. Richardson*, 105 Mass. 41; *Kean v. Stetson*, 5 Pick. 492, 495; *Leffingwell v. Warren*, 2 Black, 599; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382; *Seeley v. Brush*, 5 Conn. 419; *Church v. Meeker*, 34 Conn. 421; *Chapman v. Kimball*, 9 Conn. 41; *Middleton v. Sage*, 8 Conn. 228; *Palmer v. Hicks*, 6 Johns. 133; 2 Kent Com. 427. In Massachusetts, see Stat. 1867, c. 275.

⁵ *Post*, c. 5.

title thereto may be lost by disseisin,¹ and a title to the upland, acquired by long-continued possession, carries the adjoining flats as appurtenant or parcel without proof of actual possession, unless there is evidence that the title to the upland has been separated from that to the flats.² A disseisin of flats is made by a continued, exclusive, and adverse occupation thereof for the statutory period, usually twenty years; as by enclosing them with a boom, which rests thereon, when the tide is out, under a claim of title to the flats,³ by enclosing a small pond with a wall, and the use of the same for the purpose of a tide-mill and for storing logs;⁴ by filling them up and using them for a highway,⁵ or erecting a wharf thereon and using the adjoining flats for mooring vessels,⁶ or maintaining fences of stakes or twigs, erected for fish weirs.⁷ The habitual and continued taking of wreck or seaweed from unenclosed flats, and licensing others to do so, or cutting grass thereon, under a claim of right, may or may not, it seems, establish a disseisin according to the circumstances of the case.⁸ But sailing over unimproved flats when covered by the tide, or anchoring upon them, or using

¹ *Wheeler v. Stone*, 1 Cush. 313; *Boston v. Richardson*, 105 Mass. 351; *Clancey v. Houdlette*, 39 Maine, 451; *Treat v. Chipman*, 35 Maine, 34.

² *Valentine v. Piper*, 22 Pick. 85; *Porter v. Sullivan*, 7 Gray, 441, 445; *Commonwealth v. Alger*, 7 Cush. 53, 80; *Sparhawk v. Bullard*, 1 Met. 95; *Thornton v. Foss*, 26 Maine, 402; *Brackett v. Persons Unknown*, 53 Maine, 228, 238. As one tract of land cannot pass as an appurtenance to another tract, the flats go with the upland as parcel rather than as appurtenant. *Ammidown v. Granite Bank*, 13 Allen, 285, 291; *Central Wharf v. India Wharf*, 123 Mass. 561, 566.

³ *Stetson v. Veazie*, 11 Maine, 408.

⁴ *Tufts v. Charlestown*, 117 Mass. 401.

⁵ *Tyler v. Hammond*, 11 Pick. 193. It was also held in *Tyler v. Hammond* that the lessee of an easement in a dock may dispossess the lessor by taking

exclusive possession and holding against the latter's will, and that an easement does not become merged or lost by a disseisin or wrongful claim of title against the owner of the servient tenement. *Stetson v. Veazie*, 11 Maine, 408; *Locks & Canals v. Nashua Railroad Co.*, 104 Mass. 1, 8.

⁶ *Wheeler v. Stone*, 1 Cush. 313; *Rust v. Boston Mill Corporation*, 6 Pick. 158; 9 Gray, 524; *Hamblet v. Francis*, 4 Mass. 75; *Treat v. Chipman*, 35 Maine, 34; *State v. Wilson*, 42 Maine, 9.

⁷ *Treat v. Chipman*, 35 Maine, 34.

⁸ *Hale, De Jure Maris*, c. 6; *Hargrave's Law Tracts*, 27; *Hall on the Seashore* (2d ed.), 32; *East Hampton v. Kirk*, 84 N. Y. 215; 68 N. Y. 459; *Commonwealth v. Roxbury*, 9 Gray, 451, 499; *Thacher v. Cobb*, 5 Pick. 423; *Tappan v. Burnham*, 8 Allen, 65; *Thornton v. Foss*, 26 Maine, 402; *Clancey v. Houdlette*, 39 Maine, 457.

them for the purpose of approaching a wharf from the sea, or taking shell-fish therefrom, being the exercise of a public right, is not such possession as constitutes a disseisin.¹ So a grant by the State of a several fishery in a public navigable river cannot be presumed from the uninterrupted use and enjoyment of such fishery by an individual in common with others for more than twenty years.² The mere user of the seashore by the turning on of cattle, although continued for a period of sixty years, is not such an act of ownership as to raise a presumption of title in the owner of the cattle, without proof of the exercise of the right in the face of opposition on the part of the person interested in resisting the right, or of knowledge and acquiescence on his part, inasmuch as the seashore is property of such a nature that it cannot easily be protected against intrusion, and would not usually be worth the trouble and expense of fencing.³ In case of a mixed possession, the seisin of flats follows the legal title;⁴ and, if the claim is doubtful in extent, or not to the entire parcel, a title by disseisin is limited by the actual occupation, and is not to be extended by construction.⁵ If the individual inhabitants of a town use land upon the seashore as a landing place, this does not support, but is adverse to, a claim of possession by the town in its corporate capacity,⁶

¹ *Drake v. Curtis*, 1 Cush. 395; *Pick*. 171; *Wheeler v. Stone*, 1 Cush. 317; 9 Gray, 523; *Barnstable v. Curtis v. Francis*, 9 Cush. 466; *Brimmer v. Long Wharf*, 5 Pick. 139; *Thacher*, 3 Met. 239; *Tappan v. Gray v. Bartlett*, 20 Pick. 192; *Weston v. Sampson*, 8 Cush. 347; *Porter v. Sullivan*, 7 Gray, 441; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382; *Boulo v. New Orleans Railroad Co.*, 55 Ala. 480; *Deering v. Long Wharf*, 25 Maine, 65.

² *Delaware Railroad Co. v. Stump*, 8 Gill & J. 479.

³ *Attorney General v. Chambers*, 4 De Gex & J. 55; *Thomas v. Marshfield*, 10 Pick. 364; 13 Pick. 240; *Donnell v. Clark*, 19 Maine, 174, 183.

⁴ *Codman v. Winslow*, 10 Mass. 151; *Hamblet v. Francis*, 4 Mass. 75; *Brimmer v. Long Wharf*, 5 Pick. 135; *Rust v. Boston Mill Corporation*, 6

Pick. 171; *Wheeler v. Stone*, 1 Cush. 317; 9 Gray, 523; *Barnstable v. Thacher*, 3 Met. 239; *Tappan v. Burnham*, 8 Allen, 65, 70; *Coleman v. San Raphael Road Co.*, 49 Cal. 517; *Stearns v. Woodbury*, 10 Met. 27.

⁵ *Boston v. Richardson*, 105 Mass. 372; *Kennebeck Purchase v. Springer*, 4 Mass. 416; *Boston Mill Corporation v. Bulfinch*, 6 Mass. 229; *Brown v. Nye*, 12 Mass. 285; *Brimmer v. Long Wharf*, 5 Pick. 131; *Porguand v. Smith*, 8 Pick. 272; *Wheeler v. Stone*, 1 Cush. 313, 317, 322; *Allen v. Holton*, 20 Pick. 458; *Watkins v. Holman*, 16 Peters, 25, 55; *Thornton v. Foss*, 26 Maine, 402.

⁶ *Green v. Chelsea*, 24 Pick. 71. In *Boston v. Richardson*, 105 Mass. 351, evidence was held admissible, in sup-

although the use and enjoyment of the landing place by the inhabitants of other towns, as well as by those of the town in which it is situated, would be sufficient to establish a right by prescription in all the inhabitants of the State.¹ So the acts of such individual inhabitants, during a long period of time, in taking seaweed from a beach for the purpose of manuring their lands, is not competent evidence of a lost grant to the town from the owners of the beach.² Perambulations are not evidence against the State that a town possesses the title to flats within its limits;³ nor do votes of a town, which grant annually to individuals the right to take shell-fish from beaches within its limits for a specified price paid to the town, and which provide for the preservation of the beaches, tend to establish in the town an absolute title to the beaches.⁴

§ 38. In *Corfield v. Coryell*,⁵ the question was whether a statute passed by the legislature of New Jersey, which prohibited any person, not an actual resident of the State, raking or gathering clams, oysters, or shells in any of the rivers, bays, or waters in the State, was repugnant to the provision of the constitution of the United States that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."⁶ It was held that the control of fisheries was not ceded to the United States by the commerce clause of the constitution; that this

port of a claim of title by disseisin, in favor of a city, that it had maintained a fish-house and engine-house at the end of a highway toward the sea, and had repaired a capsill standing on a stone wall at the head of the dock; with respect, at least, to the land covered by the buildings.

¹ *Coolidge v. Learned*, 8 Pick. 504; *Commonwealth v. Newbury*, 2 Pick. 51. Reputation is evidence upon the question whether a landing place is public or private property, and there is no distinction between the evidence of reputation to establish and to dis-

parage the public right. *Drinkwater v. Porter*, 7 C. & P. 181; *Rex v. Sutton*, 3 N. & P. 569.

² *Sale v. Pratt*, 19 Pick. 191.

³ *Commonwealth v. Roxbury*, 9 Gray, 457. But see *Hale, De Jure Maris*, c. 4; *Hargrave's Law Tracts*, 27.

⁴ *Lynn v. Nahant*, 113 Mass. 433; *West Roxbury v. Stoddard*, 7 Allen, 158.

⁵ 4 Wash. C. C. 371; *Bennett v. Boggs*, 1 Bald. C. C. 72; *Thompson v. Whitman*, 18 Wall. 457.

⁶ Art. 4, § 2.

is a right of property vested in certain individuals, or in the State for the use of its citizens; and that the provision just quoted did not amount to a grant of the common property of the State to the citizens of all the other States. In the case of *Smith v. Maryland*,¹ in the Supreme Court of the United States, the question was whether a vessel, which was owned by a citizen of Pennsylvania, and was enrolled and licensed for the coasting trade under an act of Congress, was lawfully condemned to be forfeited to the State of Maryland for the violation of an act of that State designed to protect the growth of oysters in its waters by prohibiting the use of particular instruments in dredging them. The court expressed no opinion upon the questions considered in *Corfield v. Coryell*, but held that it was within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States for a disobedience, by those on board, of the law in question. In the recent case of *McCready v. Virginia*,² the same court held, with respect to a statute of Virginia, similar in its provisions to that considered in *Corfield v. Coryell*,³ that the power over fisheries had not been granted to the United States, and that the right to gather oysters is a right of property, which, though common to all the citizens of the particular State, is not a general privilege or immunity of citizenship. The same has frequently been held in the State courts.⁴ In *Dunham v. Lamphere*,⁵ in Massachusetts, the defendant was a citizen of Rhode Island, and had a fishing license under the laws of the United States, and the action was brought to recover a penalty imposed for the violation of a statute of Massachusetts, which made it unlawful for any person to take fish with seines within one mile from the

¹ 18 How. 71; *Thompson v. Whitman*, 18 Wall. 457; *The Ann*, 24 Alb. L. Journ. 515.

² 94 U. S. 391; *McCready v. Commonwealth*, 27 Gratt. 985, 982; *Martin v. Waddell*, 16 Peters, 367.

³ 4 Wash. C. C. 371, cited above.

⁴ *Haney v. Compton*, 36 N. J. L. 507; *Day v. Compton*, 37 N. J. L. 514;

State v. Medbury, 3 R. I. 138; *New England Oyster Co. v. McGarvey*, 12 R. I. 385; *Crandall v. State*, 10 Conn. 340; *Dunham v. Lamphere*, 3 Gray, 268; *People v. Coleman*, 4 Cal. 46; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Johnson v. Drummond*, 20 Gratt. 419.

⁵ 3 Gray, 268.

shores of Nantucket and other small islands. It was held that this law, which applied to the coast fisheries in the outer sea as well as in the waters within the islands, was not repugnant to the Federal Constitution. This decision was prior to the Massachusetts statute, which extended the territorial jurisdiction of the State one marine league seaward from its seashore at low-water mark,¹ and the statute declared to be constitutional was treated as making the sea within a mile from the islands a part of the territory of the State.² It follows from these authorities that the coast fisheries, as well as those in inland tide waters, and the taking of both shell and floating fish, are under the control of the respective States, and that each State may lawfully exclude the citizens of other States from these privileges.

§ 39. The United States is the source of title to lands within its limits which are not within the boundaries of the States, and the new States, being admitted into the Union upon an equal footing with the original States, become entitled to all the rights and privileges possessed by the latter.³ They have the same rights, sovereignty, and jurisdiction, as to the soil of navigable waters, as the older States;⁴ and neither the right of the United States to

¹ Mass. St. 1850, c. 6; Gen. Sts. c. 1, § 1; *Ante*, § 16.

² Shaw, C. J., here said (3 Gray, 269, 270): "The fact of taking fish by a seine within a mile of the shore of Gravel Island, which constitutes part of the territory of the State, after the act went into operation, is plainly contrary to the letter of the statute, and leaves the only question to be, whether the statute itself has the force of law. Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the State, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be that these limits extend a marine league, or three geographical miles, from the shore;

and, in ascertaining the line of shore, this limit does not follow each narrow inlet or arm of the sea; but when the inlet is so narrow that persons and objects can be descried across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet."

³ Pollard v. Hagan, 3 How. 212.

⁴ Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Hallett v. Beebe, 13 How. 25; Withers v. Buckley, 20 How. 84; St. Clair Co. v. Lovington, 23 Wall. 46, 68; Mumford v. Wardwell, 6 Wall. 423, 436; Weber v. Harbor Commissioners, 18 Wall. 57; Friedman v. Goodwin, 1 McAll. 142; Teschemacher v. Thompson, 18 Cal. 11; Gunter v. Geary, 1 Cal. 402;

the public lands, nor the power conferred upon Congress to make laws and regulations for the sale and disposition thereof, enables the general government to grant the shores and bed of such waters within the limits of a new State after its admission into the Union.¹ The new States may possess lands, either under grants from the United States or by virtue of their sovereignty; and their ownership of the seashore and of the soil of the bays and inlets of the sea is of the latter class.²

§ 40. In *Hinman v. Warren*,³ in Oregon, it was held that the United States, while holding the title to the soil of tide waters, cannot make a valid conveyance of such soil. There are also *dicta* to this effect in the case of *Haight v. Keokuk*,⁴ in Iowa, but *Hinman v. Warren* appears to be the only adjudication upon the subject. According to this view, the United States holds purely as trustee for the future State, and is without statutory or constitutional authority to do any act making it impossible to admit the new State upon a footing equal, in all respects, with that of the other States. The decisions of the Supreme Court of the United States have been thought to lead to the conclusion reached in *Hinman v. Warren*;⁵ but it would seem that there is no very direct expression of such a view, in the opinions of that court.⁶ The power of Congress to legislate in the interest

Chapin v. Bourne, 8 Cal. 298; *El-
dridge v. Cowell*, 4 Cal. 81; *People v.
Davidson*, 30 Cal. 379; *Farish v. Coon*,
40 Cal. 33; *Coburn v. Ames*, 52 Cal.
385; *Le Roy v. Dunkerly*, 54 Cal. 452;
Hinman v. Warren, 6 Oregon, 408;
Strader v. Graham, 10 How. 82; *Boulo
v. Mobile Railroad Co.*, 55 Ala. 480.
See *Pollard v. Kibbe*, 14 Peters, 353;
9 Porter, 712; *Mobile v. Eslava*, 16
Peters, 234; 9 Porter, 577; *Mobile v.
Hallet*, 16 Peters, 261; *Mobile v.
Emanuel*, 1 How. 95; *Pollard v. Files*,
2 How. 592, 3 Ala. 47; *Duval v.
McLoskey*, 1 Ala. 708, 747; *Kemp v.
Thorp*, 3 Ala. 291; *Hagan v. Camp-
bell*, 8 Porter, 9.

¹ *Ibid.*; *Pollard v. Hagan*, 3 How.
212, 230.

² *Guy v. Hermance*, 5 Cal. 73;
People v. Morrill, 26 Cal. 336; *Ward
v. Mulford*, 32 Cal. 365.

³ 6 Oregon, 408.

⁴ 4 Iowa, 199, 213.

⁵ *Hinman v. Warren*, 6 Oregon, 408,
411.

⁶ In *Weber v. Harbor Commission-
ers*, 18 Wall. 57, 65, Mr. Justice Field
said: "Although the title to the soil
under the tide waters of the bay (of
San Francisco) was acquired by the
United States by session from Mexico,
equally with the title to the upland,
they hold it only in trust for the future

of a territory is superior to that of the territorial legislature,¹ apart from the authority to regulate commerce, granted by the Constitution of the United States; and it would seem that Congress may, at least, make such grants in aid of commerce and navigation, as are necessary for the erection of wharves, piers, dams, and bridges in navigable waters, if, indeed, there is any power in the courts to review its determination as to the means of promoting these public interests. In the earlier cases of *Mobile v. Eslava*,² and *Mobile v. Hallet*,³ Mr. Justice Catron says, in a dissenting opinion, that it had not been doubted that the United States could convey the soil under the navigable waters of Alabama, prior to its admission into the Union.

State. Upon the admission of California into the Union upon an equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State." But in *Barney v. Keokuk*, 94 U. S. 324, 338, the question was left open, Bradley, J., saying, in speaking of the surveys by the general government of lands adjoining the navigable fresh rivers of the West (*post*, § 68): "It properly belonged to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water." In *Gavit v. Chambers*, 3 Ohio, 496, 498, the court, in adopting the common-law rule, by which the title of riparian proprietors upon all fresh-water streams extends *usque ad filum aquae*, said: "There is nothing in the trust vested in Congress, and executed by them, and nothing in the manner of executing it, to warrant the establishment of a different principle here."

¹ See U. S. Rev. Stats. §§ 1850, 1891; *American Ins. Co. v. Canter*, 1 Peters, 511, 545; *Scott v. Jones*, 5 How. 343; *United States v. Gratiot*, 14 Peters, 526; *Reynolds v. United States*, 98 U. S. 145; *Ferris v. Higley*, 20 Wall.

375; *National Bank v. Yankton*, 101 U. S. 129, 133; *Clinton v. Englebrecht*, 13 Wall. 434; *United States v. Vigil*, 13 Wall. 449, 451; *Johnson v. McIntosh*, 8 Wheat. 543; *Fletcher v. Peck*, 6 Cranch, 142; *Carpenter v. Rogers*, 1 Mon. Ter. 90; *Territory v. Lee*, 2 Id. 124; *Reynolds v. People*, 1 Col. 179; *Carson River Co. v. Barrett*, 2 Nev. 249; *Swan v. Williams*, 2 Mich. 427; 3 Story Com. 193, 536; 1 Kent Com. 257, 384; *Franklin v. United States*, 1 Col. 35; *Reynolds v. People*, Id. 179; *Wisconsin v. Doty*, 1 Pinney (Wis.) 396; *Van Sickie v. Haines*, 7 Nev. 249; *Union Mining Co. v. Ferris*, 2 Sawyer, 176.

² 16 Peters, 234; 9 Porter, 577.

³ 16 Peters, 261. See also *Pollard v. Hagan*, 3 How. 212; *Hagan v. Campbell*, 8 Porter, 1; *Abbot v. Kennedy*, 5 Ala. 393, 396; *Hendricks v. Johnson*, 6 Porter, 472; *Mobile v. Emanuel*, 1 How. 95, 98, 102; 17 Peters, 155; 9 Porter, 403; *Pollard v. Files*, 2 How. 591; s. c. 3 Ala. 47; *Pollard v. Kibbe*, 14 Peters, 353; 9 How. 471; s. c. 1 Ala. 403; *Doe v. Beebe*, 13 How. 25; *Hallett v. Beebe*, 13 How. 25; 8 Ala. 909; *Pollard v. Greit*, 8 Ala. 930; *Hallett v. Hunt*, 7 Ala. 882. See *Tripp v. Spring*, 5 Sawyer, 209.

CHAPTER III.

RIVERS.

SECTION.

41. River and water course defined.
42. Navigable or tidal rivers.
43. What streams are navigable and public.
44. A river is navigable and public at common law as far as the water is ordinarily ponded back by the tide.
45. Banks and shores of rivers.
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- 63, 64. Ibid. — Mississippi.
65. Ibid. — Pennsylvania.
- 66, 67. Ibid. — The effect of decisions respecting the admiralty jurisdiction.
68. Ibid. — The ordinance of 1787.
69. Ibid. — The public land system. Illinois.
70. Ibid. — Ohio.
71. Ibid. — The Ohio River. Indiana.
72. Ibid. — Iowa.
73. Ibid. — Missouri.
74. Ibid. — Alabama.
75. Ibid. — Michigan and Wisconsin.
76. Late decisions in the Western States limit private ownership to the margin of the river.

SECTION.

- 77. What is the river under this rule.
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- 84. Ibid. — Massachusetts.
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§ 41. A river is a running stream of water pent in on either side by banks, shores, or walls; and it bears that name as well where the waters flow and reflow with the tide as where the current is always in one direction.¹ Every river consists of: (1) the bed; (2) the water; (3) the banks or shores;² and it also has a current.³ It is a river or water course from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes,⁴ etc. It may sometimes be dry, but in order to be within the above definition it must appear that the water usu-

¹ *Callis on Sewers*, 77; *Woolrych on Waters*, 31; *Tenterden, C. J.*, in *Rex v. Oxfordshire*, 1 B. & Ad. 289, 301; *Rex v. Trafford*, 1 B. & Ad. 874, 887; 8 Bing. 204; *Queen v. Derbyshire*, 2 Q. B. 745, 750; *Rex v. Whitney*, 3 Ad. & El. 69; 1 H. & N. 147; 7 C. & P. 208; *Abraham v. Great Northern Railway Co.*, 16 Q. B. 586, 597; *Menzies v. Breadalbane*, 3 Wilson & Shaw, 235, 243; *Long v. Boone County*, 36 Iowa, 60.

² "Shore" is strictly applicable only to the space between ordinary high and low-water mark in a tidal river, but it is sometimes used with reference to a fresh river, or lake, either as synonymous with bank, or as denoting that portion of the bank which touches the margin of the stream at low water. See *Handly v. Anthony*, 5 Wheat. 374, 385; *Dutton v. Strong*, 1 Black, 23, 32; *Child v. Starr*, 4 Hill, 369, 375, 380; *Stone v. Augusta*, 46

Maine, 127, 137; *McCulloch v. Wainright*, 14 Penn. St. 171, *post*, § 45; *Lacy v. Green*, 84 Penn. St. 514. A fresh river "has *ripam*, but not *littus*." *Per Walworth, Ch.*, in *Child v. Starr*, 4 Hill, 369, 375. "The bank and the water are correlative. You cannot own one without touching the other." *Per Cowen, J.*, in *Starr v. Child*, 20 Wend. 149, 152.

³ *State v. Gilmanton*, 9 N. H. 461; 14 N. H. 467.

⁴ *Horne v. Mackenzie*, 6 Cl. & Fin. 628; *Dudden v. Clutton Union*, 11 Ex. 627; *Rawstron v. Taylor*, Id. 369; *Wood v. Waud*, 3 Ex. 748; *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; *Taylor v. St. Helen's Co.*, 6 Ch. D. 264; *Gallup v. Tracy*, 25 Conn. 16. As to river-water flowing into an arm of the sea, see *Horne v. Mackenzie*, 6 Cl. & Fin. 628; *post*, § 44, note.

ally flows in a particular direction, and has a regular channel, with bed, banks, or sides.¹ Whether it does so flow is a question of fact for the jury.² The bed, which is a definite and commonly a permanent channel, is the characteristic which distinguishes these waters from mere surface drainage, flowing without a defined course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty and belong exclusively to the owner thereof.³ The fact that these waters have a current gives rise to questions relating to the obstruction and acceleration of the water which do not arise in the case of still waters, like lakes and ponds. A stream necessarily involves the idea of a current;⁴ and a statute which provides for bridges over streams separating towns confers no authority to construct bridges over lakes, bays, or marshes, in which the water has no regular and perceptible flow.⁵

§ 42. Those rivers and parts of rivers in which the tide ebbs and flows are known as “navigable” rivers, and by the common law they are vested *prima facie* in the Crown.⁶

¹ Chasemore v. Richards, 7 H. L. Cas. 349; 5 H. & N. 983; 2 H. & N. 168; Rawstron v. Taylor, 11 Exch. 369; Luther v. Winnesimmet Co., 9 Cush. 171; Ashley v. Wolcott, 11 Cush. 192, 195; Parks v. Newburyport, 10 Gray, 28; Flagg v. Worcester, 13 Gray, 601; Dickinson v. Worcester, 7 Allen, 19; Wheeler v. Worcester, 10 Allen, 591; Gannon v. Hargadon, 10 Allen, 106; Bates v. Smith, 100 Mass. 181; Emery v. Lowell, 104 Mass. 13; Morrill v. Hurley, 120 Mass. 99; State v. Gilmanton, 14 N. H. 467; Bangor v. Lansil, 51 Maine, 521; Greeley v. Maine Central Railroad Co., 53 Maine, 200; Morrison v. Bucksport Railroad Co., 67 Maine, 353; Buffum v. Harris, 5 R. I. 243; Goodale v. Tuttle, 29 N. Y. 459; Earl v. De Hart, 1 Beasley, 280; Bowlsby v. Speer, 31 N. J. L. 351; Shields v. Arndt, 3 Green Ch. 234; Beard v.

Murphy, 37 Vt. 99; Swett v. Cutts, 50 N. H. 439; Kauffman v. Griesemer, 26 Penn. St. 407; Gillham v. Madison Railroad Co., 49 Ill. 484; Hoyt v. Hudson, 27 Wis. 656; Eulrich v. Richer, 37 Wis. 226; 41 Wis. 318; Barnes v. Sabron, 10 Nev. 217; Imler v. Springfield, 55 Mo. 119; Jones v. Hannovan, Ibid. 462; New Albany Railroad Co. v. Peterson, 14 Ind. 112; Greencastle v. Hazlett, 23 Ind. 186; Taylor v. Fickas, 64 Ind. 167; Schlichter v. Phillippy, 67 Ind. 201.

² Ibid.; Eulrich v. Richer, 37 Wis. 226; 41 Wis. 318.

³ Taylor v. Fickas, 64 Ind. 167, and above authorities.

⁴ Joliet Railroad Co. v. Healy, 94 Ill. 416, 421.

⁵ *In re* Freeholders, 68 N. Y. 376, 459.

⁶ *Ante*, § 4. The different meanings of the word “navigable,” as em-

Hence, as was said in an early case, "all the navigable rivers in England appertain to the king."¹ They are arms of the sea, and the king has them because they partake of its nature.² This ownership is for the public benefit,³ and in this country each state, as sovereign, has succeeded to the rights which the king formerly possessed in such rivers and in the soil beneath.⁴ The high and low-water marks which define the shores are determined by the same rules as in the case of the shores of the sea and the arms of the sea, and the rights of the public extend to ordinary high-water mark.⁵ Islands which are formed in these rivers belong to the king,⁶ and in this country to the respective States as sovereign powers,⁷ and the rights of navigation⁸ and fishery in them, which are *prima facie* common to all, cannot be impaired by a grant from the Crown at common law, but may be by a State within the limits of which the waters lie, if intercommunication between different States is not thereby affected.

§ 43. The presence of the tide is strong *prima facie* evidence that a river is public and useful for navigation. It is

ployed in legal phraseology, are thus defined by Gray, C. J., in *Commonwealth v. Vincent*, 108 Mass. 441, 447: "The term 'navigable waters,' as commonly used in the law, has three distinct meanings: 1st, as synonymous with 'tide waters,' being waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or, 2d, as limited to tide waters which are capable of being navigated for some useful purpose; or, 3d (which has not prevailed in this Commonwealth), as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation"; citing *Commonwealth v. Chapin*, 5 Pick. 199; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Murdock v. Stickney*, 8 Cush. 113, 115; *Attorney General v. Woods*, 108 Mass. 436; *Waters v. Lilley*, 4 Pick. 145, 147; *Genesee Chief v. Fitzhugh*, 12 How. 443; *The Daniel Ball*,

10 Wall. 557. See also, *Mayor of Colchester v. Brooke*, 7 Q. B. 339, 374; *The Montello*, 20 Wall. 430, 442; *Abraham v. Great Northern Railway Co.*, 16 Q. B. 586, 598. In those Western States, where there are no tidal waters, the word "navigable" is not commonly employed in the technical sense. See *Hickok v. Hine*, 23 Ohio St. 523.

¹ *Rex v. Trinity House*, 1 Sid. 86; s. c. 1 Keb. 331.

² *Royal Fishery of the Banne*, Sir John Davies, 149.

³ *Ante*, § 17.

⁴ *Ante*, § 32.

⁵ *Ante*, § 27.

⁶ *Hale, De Jure Maris*, c. 6, ii.; *Calis on Sewers*, 45.

⁷ *Middletown v. Sage*, 8 Conn. 221; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382; *Hopkins Academy v. Dickerson*, 9 Cush. 544, 550.

⁸ *Ante*, § 21.

not, however, conclusive. In many small creeks and inlets of the sea private property may exist. The extent to which a river, whether its waters are salt or fresh, is used for navigation, affords the strongest evidence of its navigable capacity.¹ If the channel is broad and deep and adapted to the purposes of commerce, it is a natural conclusion that it is a public navigation;² but if it is a small creek, navigable only at exceptional and extraordinary tides,³ or at certain states of the tide, and then only for a short time and by very small boats, its inadaptability for general use is strong, if not conclusive, evidence against the existence of a public right.⁴

¹ See *Miles v. Rosc*, 5 Taunt. 706; *Voght v. Winch*, 2 B. & Ald. 662. In the early case of *Commonwealth v. Charlestown*, 1 Pick. 180, 186-188, Parker, C. J., said: "By the common law, the property of the sovereign is said to extend to all places where the sea ebbs and flows, whether such places are navigable or not; but it is probable the usages of our country have given a reasonable limitation to this doctrine, confining the public right to what may be of public use; so that in many little creeks into which the salt water flows, but which are incapable of being navigated at all, private property may be maintained. This is undoubtedly the case with many of the creeks which run through our extensive marshes, over which small bridges are thrown for the convenience of removing the hay; and yet whenever these streams are large enough for the passage of boats, and gondolas, or lighters, and pass through the lands of several proprietors, no one can obstruct them, even in his own grounds, unless he has acquired a right by prescription; which probably is the case with many of them. . . . There is but one principle for judicial courts to be governed by, and that is, to consider as public property all those inlets of the sea which are capable of sustaining vessels of any description, with their loading,

for purposes really useful to trade or agriculture. It has been urged, that the actual use of them for such purposes is necessary to give them the character of public property; but it is obvious there can be no such qualification of the principle at common law; for it would go to allow the occupation, by individuals or corporations, of many of the most important public privileges, in the early settlement of the country, before ports and places of deposit should become valuable." It is now settled that the public right is limited to those streams and inlets which are capable of public use. *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Charlestown v. County Commissioners*, 3 Met. (Mass.) 202; *Attorney General v. Woods*, 108 Mass. 436; 9 Gray, 519, note; *The Montello*, 20 Wall. 430, 442, 443; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 487; *Weathersfield v. Humphrey*, 20 Conn. 218; *Groton v. Hurlburt*, 22 Conn. 178; *Burrows v. Gallup*, 32 Conn. 501; *Brown v. Preston*, 38 Conn. 219; *Glover v. Powell*, 10 N. J. Eq. 211; *Flanagan v. Philadelphia*, 42 Penn. St. 219.

² See *per* Bailey, J., in *Rex v. Montague*, 4 B. & C. 598.

³ *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Attorney General v. Woods*, 108 Mass. 436.

⁴ *Colchester v. Brooke*, 7 Q. B. 339.

The term "navigable," says Denman, C. J.,¹ "is a relative and comprehensive term, containing within it all such rights upon the water way, as with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels and boats along the channel." In *Mayor of Lynn v. Turner*,² the corporation of Lynn Regis was sued for not repairing and cleansing a tidal creek, "as from time immemorial they had been used," whereby, as appeared by one count of the declaration, the plaintiff lost the use of his navigation. It was urged that if one count of the declaration was bad, the judgment against the corporation should be set aside, and that, as the place in question was a public navigable river within the tide, no action would lie without proof of special damage; but Lord Mansfield considered that it did not sufficiently appear that it was a navigable river, and that the presence of the tide did not prevent its being in the private estate of the corporation. In *Miles v. Rose*,³ Gibbs, C. J., considered the flowing of the tide not absolutely inconsistent with a right of private property in a creek, although strong *prima facie* evidence against such right. In *Vooght v. Winch*,⁴ Holroyd, J., said that if a stream had ever been capable of navigation, an act of Parliament was the only means by which the public right could be determined; but in the later case of *Rex v. Montague*,⁵ he concurred in the opinion that

¹ *Colchester v. Brooke*, 7 Q. B. 339, 374.

² 1 Cowper, 86, Lofft. 556. Lord Mansfield here said: "*Ex facto oritur jus*. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate." The corporation was held to be bound by prescription to repair.

³ 5 Taunt. 706.

⁴ 2 B. & Ald. 662.

⁵ 4 B. & C. 598. This was an indictment for cutting a trench across

a common and ancient highway. At the trial it appeared that the highway in question was an embankment across a creek, and that the defendants cut down this embankment by order of the corporation of London, who contended that the creek was a public navigable stream, and that the road improperly obstructed it; that the road had been so high for twenty years that no boats could pass over it at any time; and that, for years before, the only evidence of an actual navigation was by very small boats for a brief period at the time of high water. Bailey, J., said: "It was for the defendant to make out that there once was a public navigation. Now it does

the public right might be extinguished in other ways than by act of Parliament; as by writ of *ad quod damnum*, or by the commissioners of sewers in certain cases, or by natural causes, such as the filling of the channel or the recession of the sea. Again, in the case of *Mayor of Colchester v. Brooke*,¹ Lord Denman, C. J., while regarding the flow and reflow of the tide as the strongest evidence that a river was public and navigable, considered the fact that the soil in arms of the sea and public navigable rivers, independently of any ownership of the adjoining lands, is *prima facie* vested in the Crown, but subject to the public right, and that the grantee of the Crown takes subject to the same right, not inconsistent with the loss of such right if the channel became choked up by natural causes.

§ 44. The question at what point a river ceases to be tidal, or navigable, first arose in the courts in the case of

not necessarily follow, because the tide flows and reflows in any particular place that there is therefore a public navigation, although of sufficient size"; and after reviewing the above cases of *Mayor of Lynn v. Turner*, and *Miles v. Rose*, he said further: "The strength of this *prima facie* evidence, arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel. But even supposing this to have been at some time a public navigation, I think that from the manner in which it has been neglected by the public, and from the length of time during which it has been obstructed, it ought to be presumed that the rights of the public have been lawfully determined. Most

probably the rights of the public (if they ever had any) arose from the flux and reflux of the tides of the sea, so as to make the channel navigable. If then the sea retreated, or the channel silted up, so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes put an end to them? But they might also be put an end to by act of parliament, or by writ of *ad quod damnum*, and, perhaps, by commissioners of sewers, if there were any appointed for the district and they found that it would be for the benefit of the whole level. For these reasons it appears to me that if this case were sent down for trial again, the jury would be bound to find either that there never was a public navigation through the *locus in quo*, or that it has been determined by some lawful means." The opinions of Holroyd, J., and Littledale, J., were to the same effect.

¹ 7 Q. B. 339, 373, 374. See also *Rex v. Douglas*, 2 Ld. Kenyon, 499; *Woolrych on Waters*, 237.

Rex v. Smith.¹ In that case the city of London, acting under powers conferred by statute, was proceeding to construct a towing path upon the bed of the river Thames, and the defendants were indicted for destroying a pile driven in the course of the work between high and low-water mark near Richmond. In the statement of the case, the river was admitted to be "navigable"; but, as the right of the city was regarded as derived from the Crown's title to tide waters, it was contended in argument that the Thames above London Bridge was not navigable in the technical sense, although there was a regular rise and fall of the river caused by the accumulation and pressure backwards of the fresh water. Lord Mansfield said that the distinction between rivers navigable and not navigable, and those where the sea does or does not ebb and flow, was very ancient, but that the distinction then insisted on, between the case of the tide occasioned by the flux of the sea-water and the pressure backward of the fresh water, seemed to be entirely new.² He said that the case did not state whether the water, where the tide rises at Richmond, is fresh or salt; but that it rather took it for granted that it is salt, describing the Thames generally as a navigable river. The point was simply raised in that case, and not decided.³ But it is settled in this country

¹ 2 Dougl. 441 (1780). In *Horne v. Mackenzie*, 6 Cl. & Fin. 628, 643, the question was whether the defendants had fished unlawfully by means of stake-nets, which was an illegal act by statute if done in a "river," but permissible in the sea; and it was held that the jury were improperly instructed that "the thing to be looked at is the absence or prevalence of the fresh water, though strongly impregnated by salt"; and that the absence or prevalence of salt water was a consideration of minor importance in such a case.

² The question was not altogether new, for Lord Hale says (*De Jure Maris*, c. 4, with reference to the extent to which a river is properly

called an arm of the sea), that fresh rivers, "though they are public rivers, yet are not arms of the sea. But it seems that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in Thames above the bridge."

³ This case seems to have been misunderstood. In *Angell on Water-courses*, § 544, it is said of it that the point in question was by Lord Mansfield "pronounced new and inadmissible"; while in *Attorney General v. Woods*, 108 Mass. 439, Chapman, C. J., spoke of the question as there "settled." The point was indeed urged by counsel, but Lord Mansfield expressed no opinion upon it, saying

that it is the fluctuation of the water, as shown by its regular rise and fall, under the influence of the tide, and not the proportion of salt water to fresh, that determines the point in a river at which its navigable character ceases. It was so decided in the Supreme Court of the United States with reference to the Mississippi River at New Orleans;¹ in Maine, in respect to the Penobscot River at Bangor;² and in Massachusetts, as to a portion of the Mystic River where the rise and fall of the water was two feet and the stream only about the same number of feet deep at low tide.³ In the recent English case of *Reece v. Miller*,⁴ it appeared that the water of the river Wye was not salt at the spot in question, and that in ordinary tides it was unaffected by any tidal influence, but that, upon the occasion of very high tides, the rising of the salt water in the lower parts of the river dammed back the fresh water, and caused it to rise and fall with the tide. It was held that the right of the Crown and the public right of fishery did not apply to the part of the river affected by the tide only under such circumstances or when the action of the tide was reinforced by a strong wind.

§ 45. A fresh-water river, like a tidal river, is composed of the *alveus*, or bed, and the water; but it has banks instead of shores.⁵ The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks;⁶ and in that condition of the water the banks, and the soil which is permanently submerged, form the bed of the river.⁷ The banks

"that there were no facts set forth in the case which let in the consideration of that distinction."

¹ *Peroux v. Howard*, 7 Peters, 343.

² *Lapish v. Bangor Bank*, 8 Greenl. 155.

³ *Attorney General v. Woods*, 108 Mass. 436. To the same effect are *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Stone v. Augusta*, 46 Maine, 127, 137; *People v. Tibbetts*, 19 N. Y. 523.

⁴ 8 Q. B. D. 626.

⁵ See *ante*, § 41, note.

⁶ *Howard v. Ingersoll*, 13 How. (U. S.) 381, 391, 427; 17 Ala. 780; *Houghton v. The C. D. & M. R. Co.*, 47 Iowa, 370; *Haight v. Keokuk*, 4 Iowa, 199, 212; *Stone v. Augusta*, 46 Maine, 127, 137; *Alabama v. Georgia*, 23 How. 506.

⁷ *Ibid.*; 13 How. (U. S.) p. 415. In distinguishing the banks from the permanent bed of the river, the line is determined by examining the bed and banks, and ascertaining where the

are a part of the river-bed,¹ but the river does not include lands beyond the banks, which are covered in times of freshets or extraordinary floods, or swamps or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or unenclosed pasture.² Fresh rivers, although not subject to the daily fluctuations of the tide, may rise and fall periodically at certain seasons, and thus have defined high and low-water marks. The low-water mark is the point to which the river recedes at its lowest stage.³ The high-water mark is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.⁴

§ 46. Fresh-water streams which are not a common passage are private property, and the title to the bed of the river *ad filum aquae* is in the riparian proprietors in severalty and not in common;⁵ they own the islands which form in

presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. *Ibid.*, per Curtis, J., pp. 427, 428; McCulloch v. Wainwright, 14 Penn. St. 171.

¹ *Ibid.*; Haight v. Keokuk, 4 Iowa, 199.

² *Ibid.*; 13 How. (U. S.) p. 415.

³ 13 How. pp. 417, 415, 428.

⁴ Howard v. Ingersoll, 13 How. 381; Houghton v. The C. D. & M. R. Co., 47 Iowa, 370; Musser v. Hershey, 42 Iowa, 356; McCullough v. Wainwright, 14 Penn. St. 171; Stover v. Jack, 60 Penn. St. 339; Wainwright v. McCullough, 63 Penn. St. 66. See The Batture, Am. State Papers, vol. 17, p. 90; Public Lands, vol. 2, p. 90, *et seq.*; Municipality No. 2 v. Orleans Cotton

Press, 18 La. 125, 278; Lacy v. Green, 84 Penn. St. 514; Gavit v. Chambers, 3 Ohio, 495.

⁵ Rex v. Wharton, Holt, 499; 12 Mod. 510; Carter v. Murcot, 4 Burr. 2162; King v. King, 7 Mass. 499; Lunt v. Holland, 14 Mass.; Dearfield v. Arms, 17 Pick. 41; Knight v. Wilder, 2 Cush. 200; Seneca Nation v. Knight, 23 N. Y. 498; Woodman v. Spencer, 54 N. H. 507; Adams v. Barney, 25 Vt. 225; Jackson v. Louw, 12 Johns. 252; Ball v. Slack, 2 Whart. 538; Coovert v. O'Conner, 8 Watts, 470; Barclay Railroad Co. v. Ingham, 36 Penn. St. 194; Poor v. McClure, 77 Id. 214; Bradford v. Cressey, 45 Maine, 9; Poor v. McClure, 77 Penn. St. 214; Cates v. Waddington, 2 McCord (S. C.) 580; McCullough v. Wall, 4 Rich. (S. C.) 68; Noble v. Cunningham, McMullan (S. C.) 289; Hayes v. Bowman, 1 Rand. (Va.) 417; Home v. Richards, 4 Call, 441; Smith v. In-

the stream,¹ and have the exclusive right of fishing;² and if the banks on both sides of the river belong to the same person, he owns the entire river-bed according to the extent of his lands in length.³ There is great conflict of authority with respect to the large rivers and parts of rivers which, being navigable in fact, resemble tidal rivers, and, being fresh, partake of the nature of the small unnavigable streams which feed them. Where a fresh navigable river is held to be private property, the Crown and the public

gram, 7 Ired. (N. C.) 175; *Ingraham v. Treadgill*, 3 Dev. (N. C.) 59; *Camden v. Creel*, 4 W. Va. 365.

¹ *Brickett v. Morris*, L. R. 1 H. L. Sc. 47; *Wishart v. Wyllie*, 1 Macq. H. L. 389.

² *Ibid.*

³ *Wadsworth v. Smith*, 11 Maine, 278, 281. The ground on which this rule is founded is thus explained in the dissenting opinion of Redfield, J., in *Buck v. Squires*, 22 Vt. 484, 494: "The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one which the American courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those, who in good faith had supposed themselves secure from such embarrassment. It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that in the leading, best reasoned, and best considered cases upon this subject it is laid down and fully established that

courts will always extend the boundaries of land deeded as extending to and along the sides of highways and fresh-water streams, not navigable, to the middle of such streams and highways if it can be done without manifest violence to the words used in the conveyance. And, to have this rule of the least practical importance to cure the evil which it is adapted to remedy, it must be applied to every case, where there is not expressed an evident and manifest intention to the contrary,—one from which no rational construction can escape. The rule, to be of any practical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases, when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream or way. If it is only to be applied like the ordinary rules of construction as to boundary, so as to reach, as far as may be, the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility as a rule of expediency or policy. For in ninety-nine cases in every hundred, the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance either way; hence, they use words naturally descriptive of the prominent idea in their minds at the time, and in doing so, define the land which it is expected the party will occupy and improve."

have no rights in it which are not connected with the navigation.¹

§ 47. Bracton, who wrote in the thirteenth century, and is the earliest English authority upon this question, says that of natural right flowing water, the air, the sea, and the shores of the sea are common property; that *all* rivers that flow perpetually are public, and that the right of fishing therein and the use of the river banks are public also.² This, though not the modern common-law rule, corresponds with the doctrine of the civil law, and the phraseology is substantially the same as that of the Institutes.³ No dis-

¹ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, 871; *Binney's Case*, 2 Bland, 99, 125; *Adams v. Pease*, 2 Conn. 483; *Ross v. Faust*, 54 Ind. 471; *Braxton v. Bressler*, 64 Ill. 488; *Berry v. Snyder*, 3 Bush, 266, 285. A right of public passage acquired over a highway by prescription does not authorize the public authorities to quarry stone, for the repair of other highways, in the bed of a river spanned by a bridge which forms part of the highway in question. *Overman v. May*, 35 Iowa, 89; *Commissioners v. Beckwith*, 10 Kansas, 603.

² The passages in Bracton (lib. I. c. 12, fol. 7, 8) are as follows: "Naturali vero jure communia sunt omnia haec, aqua profluens, aer et mare, et littora maris, quasi maris accessoria. . . . Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuius liberum est, sicut per ipsum fluvium navigare, sed proprietates earum est illorum quorum prediis adhaerent, et eadem de causa arbores in eisdem natae eorundem sunt; et haec intelligenda sunt de fluminibus perhennibus, quia tempo-

ralia possunt esse privata." These passages are translated in Sir Travers Twiss's edition of Bracton (vol. i., 57) as follows: "Of natural right all these things are common: flowing water, air and sea, and the shores of the sea, as being as it were approaches to the sea.

All rivers and ports are public, and accordingly the right of fishing in a port and in rivers is common to all persons. The use of the banks is also public by the right of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself; but the property of the banks is in those whose lands they adjoin; and for the same cause the trees growing upon them belong to the same persons; and this is to be understood of perennial rivers, because streams which are temporary may be property."

³ See Inst. lib. 2, 1, §§ 1, 2, 5; Royal Fishery of the Banne, Sir J. Davies, 149, 150; *Blundell v. Catterall*, 5 B. & Ald. 268, 304; *Bagott v. Orr*, 2 Bos. & P. 472. Bracton does not here follow the civil law, for while he says that the use of the sea, etc., are common, he does not add the remainder of the sentence from the civil law,

inction is here drawn between those rivers which are and those which are not navigable in fact. The passage seems to show either that the rules of the common and civil law were the same at this early period, or that Bracton, finding the subject undefined in the law of England, supplied the deficiency, as he was wont to do, by borrowing from the Roman code.¹

that the property in these things cannot be taken to belong to any one. See Hall on the Seashore (2d ed.), 104, 105. The Roman law declared navigable rivers to be so far public property that a free passage over them was open to everybody, but distinguished between rivers and the sea, the former being classed among *res publicae*, and the latter among *res communes*. Just. Inst. lib. II. tit. 1, §§ 1, 2; Dig. 43, 12; 2 Domat. bk. I. tit. 8, §§ 1, 2; 1 Phillimore's Int. Law, §§ 155-6; Vattel, Droit des Gens, liv. II. c. 9, §§ 126-130; c. 10, §§ 132-134; Puffendorf, De Jur. Nat. et Gen. lib. III. c. 3, §§ 3-6; Polson, Law of Nations, § 5; 1 Halleck Int. Law, c. 6, p. 147.

¹ As to the authority of Bracton, see 2 Reeve's History of the English Law (3d ed.), 88, 282, Crabb's History of the English Law, 157, 158; 1 Black. Com. 72; 4 Id. 425; Güterbock's Bracton, Preface; King v. Yarborough, 3 Dow & Clark, 178, 187. Mr. Reeve (p. 88 above) says: "The familiarity with which Bracton recurs to the Roman code has struck many readers more forcibly than any other part of his character; and some have thence pronounced a hasty judgment upon his fidelity as a writer on English law. But the passages to which such persons take exception, if put together, would perhaps not fill three whole pages of his book; and it may be doubted whether they are such as can always mislead the reader. Upon a second consideration of those places where the Roman law is stated with most confidence, it will be seen that it

is rather alluded to for illustration and ornament, than adduced as an authority, though it is visible that Bracton, with all his endeavors to give form and beauty to our own law, by setting forth its native strength to advantage, did not refuse such helps as could be derived from other sources to improve and augment it." Mr. Crabb (p. 158) goes farther, and says that it is evident, from an attentive perusal of Bracton's works, that they contain nothing but what has been admitted by legal authorities into English jurisprudence. In Blundell v. Catterall, 5 B. & Ald. 268, Best, J., who differed from the majority of the court as to the public right of bathing in the sea, said, with reference to the above passage from Bracton: "Bracton has not stated this as civil law; he has made it part of his book *De Legibus et Consuetudinibus Angliæ*. He was Chief Justice of England in the reign of Henry the Third; and Lord Hale (Hist. of the Common Law, c. 7) says, that in his time the common law was much improved, and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. . . . Bracton speaks not of newly-made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of Henry the Third. These, like the sea and its shores, were then the property of the public,

§ 48. The question appears to have been first passed upon judicially in the case of the Royal Fishery of the Banne,¹ decided in Ireland in the year 1611. It was there resolved: (1) that, although the rule of the civil law be as it is found in Bracton, "yet, by the common law of England, a man may have a proper and several interest as well in a water or river as in a fishery"; (2) that "there are two kinds of rivers: navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; but in every other river, not navigable, and in the fishery of such river, the *ter-tenants* on each side have an interest of common right." It is further said in this case: "The river Lee is found by acquisition the king's high stream; and in the stat. of 28 Hen. 8, c. 22, enacted in this kingdom, the rivers Barrow, Noire, and Suire are called the king's rivers, and the weirs erected in them are called *purprestures*; and, although the king permit his people, for their ease and commodity, to have common passage over such navigable rivers, yet he hath a sole interest in the soil of such rivers, and also in the fishery." The conclusion was, that "the river Banne, so far as the sea flows and ebbs in it, is a royal river; and the fishery of salmon there is a royal fishery, which belongs to the king as a several fishery, and not to those who have the soil on each side of the water. But, on the other part, it was agreed that every inland river, not navigable, appertains to the owners of the soil where it hath its course, and if such river runneth between two manors, and is the mear and boundary between them, the one moiety of the river and fishery belongeth to one lord, and the other moiety to the other."

and the right of the public in them was not acquired by any compromise with the interests of any individual. . . . In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left open to public use. In all countries, it has been matter of just complaint, that individuals have encroached on the

rights of the people. In England, our ancestors put the public rights in rivers under the safeguard of Magna Charta. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man."

¹ Sir John Davies, 149.

The real question presented for decision was, whether a royal grant of certain lands, adjacent to the river Banne, conveyed a salmon fishery at a point in the river where it was "navigable." If the word "navigable," as here used, means tidal,¹ the question of title to a fresh-water river was not in issue; and the first part of the last resolution, in which the king is held to be the owner of tidal rivers, and the resolution that nothing passes by implication in a royal grant, embrace the only points that were directly decided. It should also be noticed that the Barrow, the Noire, and the Suire, which are both navigable and fresh,² are here called royal rivers, and that the king is said to have a sole interest in the soil of these rivers, and also in the fishery.

§ 49. The treatise *De Jure Maris*, published in 1787, and usually ascribed to Sir Matthew Hale, who died in 1676, begins with the statement³ that "fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque flum aquae*; and the owners of the other side the right of soil or ownership, and fishing unto the *flum aquae* on their side." In the second chapter of the treatise, the resolution in the case of the Royal Fishery of the Banne, in which the Barrow and other fresh rivers are termed royal rivers, is criticised,⁴ but no authorities are cited in support of

¹ The word "navigable" in this case is, perhaps, of somewhat doubtful meaning, it being said that "every navigable river, so high as the sea ebbs and flows in it," is a royal river; that "every other river not navigable," and "every inland river not navigable," are private, etc. In *People v. Canal Appraisers*, 33 N. Y. 461, 470, Davies, J., interprets the case of the Royal Fishery of the Banne, and, also, *Warren v. Matthews*, 6 Mod. 73, and *Carter v. Murcot*, 4 Burr. 2162, as distinguishing only between those rivers which are, and those which are not, navigable in fact. But this view is

not supported by the English decisions in which these cases are referred to.

² See *Encyclopedia Britannica*, tit. Barrow; *Murphy v. Ryan*, Ir. R. 2 C. L. 143, 153; *De Jure Maris*, c. 2; *post*, § 51; *People v. Canal Appraisers*, 33 N. Y. 461, 470.

³ Hale, *De Jure Maris*, c. 1, 3; *Hargrave's Law Tracts*, 5.

⁴ *De Jure Maris*, c. 2. This passage is as follows: "As the common highways on the land are for the common land passage, so these kinds of rivers, whether fresh or salt, that bear boats or barges, are highways by

this passage, or of the subsequent statement that the rivers which Bracton declares to be public, "must be taken to be rivers that are arms of the sea."¹ In the same chapter, which is entitled "Of the right of prerogative in private or fresh rivers," it is said that the king has jurisdiction to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges and boats, and to reform the obstructions or annoyances therein; that these public streams which are highways by water, are called royal, not in reference to the propriety of the river, but to the public use, and that they are under the king's special care and protection, whether the soil be his or not. In chapter four it is said that the king has the right of property in the sea, and in the shore and in the creeks and arms thereof, where the sea flows and re-flows, and so far only as the sea so flows and re-flows; and that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and re-flow. These passages support the doctrine that the public have no rights in any fresh-water river except that of navigation. The authorship of the work² would not, per-

water; and as the highways by land are called *altæ viæ regiae*, so these publick rivers for publick passage are called *fluvii regales*, and *haut streames le roy*; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the king's care, supervision, and protection. And, therefore, the report in Sir John Davys, of the piscary of Banne, mistakes the reason of those books, that call these *streames le roy*, as if they were so called in respect of propriety (as 19 Ass. 6 Dy. 11), for they are called so, because they are of publick use, and under the king's special care and protection, whether the soil be his or not." The case of the Banne is also criticized in other respects in *De Jure Maris*, c. 5. With respect to the right of fishing, it

is said that salmons, "though they are great fish, are not royal fish, as the report of Sir John Davies in the case of the fishing of Banne would intimate." The other passage relates to the acquisition by a subject of rights in the sea by prescription or usage, in which it is said: "I have added the more, because there are certain glances and intimations in the case of the piscary of Banne, in Sir John Davies's reports, as if the fishing in these kinds of royal rivers were not acquirable but by special charter, which is certainly untrue; for they are acquirable by prescription or usage, as well as royal fish may be."

¹ *De Jure Maris*, c. 4; Hargrave's *Law Tracts*, 12.

² *Ante*, § 18.

haps, be of importance, were it not for the fact that, being associated with the name of Lord Hale, the positions here taken have been frequently accepted as a sufficient authority, without inquiring whether the positions themselves had a sound basis.¹ The work is posthumous, and there appears to be no evidence that it was revised or intended for publication,² or at what period of the author's life it was written, while Lord Hale's name has not made it, in all respects, incontrovertible.³

§ 50. The early authorities being thus discordant, no certain rule is supplied by the earlier English cases, which relate either to tidal rivers or to fresh rivers which do not appear to be navigable. In *Bulstrode v. Hall*,⁴ and other cases, which, upon the facts, involved no rights in places above the tide, rivers are said to belong to the king as far as the sea ebbs and flows in them. So in *Carter v. Murcot*,⁵ and *Rex v.*

¹ See Phear's Rights of Water, 47, 48.

² See Hall on the Seashore, Introduction.

³ In the light of modern decisions, the following rules laid down in this treatise are not law: First, That the realm of England extends beyond low-water mark, and includes the adjacent seas, whether they are within the body of a county or not. *De Jure Maris*, c. 4; *Hargrave's Law Tracts*, 10; *Contra*, *Regina v. Keyn*, 2 Ex. D. 63, referred to *ante*, §§ 13, 14. Second, That "any man may justify the removal of a common nuisance, either at land or by water, because every man is concerned in it." *De Portibus Maris*, c. 7; *Hargrave's Law Tracts*, 87; *Contra*, see *post*, § 128; Third, That alluvion "is *de jure communi*, by the law of England, the king's, viz.: if by any marks or measures it can be known what is so gained." *De Jure Maris*, c. 6; *Hargrave's Law Tracts*, 28; *Contra*, *Foster v. Wright*, 4 C. P. D. 100; *In re Hull & Selby Railway*, 5 M. & W. 327; *Rex v. Yarborough*, 3 B.

& C. 106; 2 Bligh, N. S. 147; *post*, c. 5. Fourth, It is now established that the right of towage along the banks of rivers does not exist in the absence of usage, grant, etc., notwithstanding the intimation in this book that this is a common-law right. *De Portibus Maris*, c. 7; *Hargrave's Law Tracts*, 86; *Ball v. Herbert*, 3 T. R. 253; *Blanchard v. Porter*, 11 Ohio, 100; *post*, § 150, c. 4. The view that has been expressed in this country that this treatise is of so high authority that there is no appeal from it (6 Cowen, 536, note; *Cobb v. Davenport*, 3 Vroom, 369, 379) would appear, therefore, to be somewhat exaggerated.

⁴ 1 Sid. 148. See, also, *Rex v. Trinity House*, Id. 86; and cases *ante*, § 18, notes; *Malcomson v. O'Dea*, 10 H. L. Cas. 619; *Warren v. Mathews*, 1 Salk. 357; 6 Mod. 73; *Carter v. Murcot*, 4 Burr. 2162.

⁵ 4 Burr. 2162. In this case the only question was whether the plaintiff had by prescription a right of several fishery at the place in question, which was admitted to be a

Smith,¹ Lord Mansfield's opinions were to the effect that the distinction is between those rivers in which the sea flows, and those in which it does not; but the cases related solely to tide waters. Upon the other hand, in Lord Fitzwalter's case,² before Chief Justice Hale, and in *Rex v. Wharton*,³ before Chief Justice Holt, a case which has been referred to⁴ as bearing upon this question, the rivers in question are not only called private rivers,⁵ but there is no intimation that they were, in fact, capable of navigation.

§ 51. The rule thus indicated may be adequate for a country like England, where the rivers are small and rarely navigable in their natural condition above the tide, and where, also, the question has not often arisen.⁶ In Ireland,

navigable river and arm of the sea. Lord Mansfield said: "The rule of law is uniform. In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aquae*. But in navigable rivers, the proprietors of the land on either side have it not; the fishery is common; it is *prima facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him, unless he can prove such a prescriptive right."

¹ 2 Dougl. 441. See *ante*, § 44.

² 1 Mod. 105. The question here was as to the defendant's right of exclusive fishery in the river of Wallfleet, and Hale, C. J., said: "In case of a private river, the lord's having the soil is good evidence to prove that he hath the right of fishing, and it puts the proof upon them that claim *liberam piscariam*. But in case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all."

³ 12 Mod. 510; s. c. Holt, 499. This case was an indictment for riot, "the

cause of the riot being the right of a private river." According to the report in 12 Mod., Holt, C. J., said: "If a river run continuously between the land of two persons, each of them is, by common right, owner of that part of the river which is next his land, and may let it to another or to a stranger." See, also, *Gibbs v. Wooliscott*, 3 Salk. 291.

⁴ *Hopkins Academy v. Dickinson*, 9 Cush. 544, 547.

⁵ The word "private" in this connection would seem to exclude rivers, whether fresh or salt, that are capable of navigation. Although in the second chapter of the treatise *De Jure Maris* the heading is, "Of the right of the prerogative in private or fresh rivers," and the expression, "a fresh or private river," is again used there; yet in that and the following chapter, the terms "public rivers" and "public streams" are applied to all rivers that are a common passage.

⁶ In *Elder v. Burrus*, 6 Humph. (Tenn.) 360, Turley, J., said: "All laws are, or ought to be, an adaptation of principles of action to the state or condition of a country, and to its moral and social position. There are many rules of action recognized

where the rivers are larger, the question was directly presented, apparently for the first time in the United Kingdom, in *Murphy v. Ryan*,¹ decided by the Irish Court of Common Pleas in 1868. This was an action of trespass for breaking and entering the plaintiff's close covered with water, called the River Barrow, and fishing therein. The issue presented, upon a demurrer to the defendant's plea, was whether, the Barrow being admitted to be from time immemorial a public and navigable river above and beyond the ebb and flow of the sea, and the alleged trespass being above that point, the defendant as one of the public had there the privilege of fishing. The demurrer was allowed, it being considered that no river had "been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing private."

§ 52. According to recent decisions in England, the title of the riparian owners extends to the centre of all non-tidal streams,² but the ground of prescription on which the rule now rests is different from that supported by the early

in England as suitable, which it would be folly in the extreme, in countries differently located, to recognize as law; and, in our opinion, this distinction between rivers 'navigable' and not 'navigable,' causing it to depend upon the ebbing and flowing of the tide, is one of them. The insular position of Great Britain, the short courses of her rivers, and the well-known fact that there are none of them navigable above tide-water but for very small craft, well warrants the distinction there drawn by the common law. But very different is the situation of the continental powers of Europe in this particular. Their streams are many of them large and long and navigable to a great extent

above tide-water; and accordingly we find that the civil law, which regulates and governs those countries, has adopted a very different rule."

¹ Ir. R. 2 C. L. 143.

² *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Dwyer v. Rich*, Ir. R. 4 C. L. 424; *Miller v. Little*, 2 L. R. Ir. 304; *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Marshall v. Ulleswater Nav. Co.*, 3 B. & S. 742; *Bristow v. Cormican*, 3 App. Cas. 641, 666; Ir. R. 10 C. L. 308, 412, 435; *Bloomfield v. Johnston*, Ir. R. 8 C. L. 63; *Mussett v. Burch*, 35 L. T. n. s. 486; *Hudson v. McRae*, 4 B. & S. 585; *Grant v. Oxford*, L. R. 4 Q. B. 9.

authorities, and is inapplicable in this country.¹ In 1838, the question was regarded as not fully settled by Lord Denman, C. J., who, in *Williams v. Wilcox*,² said: "It is clear that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide, the soil was pre-

¹ *Post*, § 53.

² 8 Ad. & El. 314, 333. This important passage of the opinion in *Williams v. Wilcox* is not noticed by Mr. Hough in his work on Rivers, in which he combats the supposed rule of the common law, or in Mr. Angell's works on Tide Waters and Water-courses. Although noticed in Hall on the Seashore (2d ed.), 3, note (f), and in Phear's Rights of Water, its meaning seems to have been misunderstood by those writers, Lord Denman's doubt being there referred to as if it related to tidal rivers, and as settled by Lord St. Leonard's opinion in *Lord Advocate v. Hamilton*, 1 Macq. H. L. 46, in which the language of the court was limited to navigable rivers. A comparison of the two cases, and an examination of the passage in *De Jure Maris*, c. 2, pl. 3, referred to in *Williams v. Wilcox*, shows that the two judges were thinking of different subjects. See *Murphy v. Ryan*, Ir. R. 2 C. L. 143, 153, 154; *Ipswich Dock v. Overseers*, 7 B. & S. 310, 335. In *Bristow v. Cormican*, 3 App. Cas. 641, 666; Ir. R. 10 C. L. 425, it was held that the crown has no title *de jure* to the soil or fisheries of an inland lake; and Lord Blackburn, referring to the doubt expressed by Wightman, J., in *Marshall v. Ulleswater Navigation Co.*, 3 B. & S. 742, upon the question whether the soil of lakes, like that of fresh-water rivers, *prima facie* belonged to the riparian owners *ad filum aquae*, or to the Crown, said: "That learned judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water, as

to justify him in unnecessarily deciding that it was the same. . . . I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad filum aquae*, should apply to a lake, is a different question. It does not seem very convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough many miles in length tacked on to his frontage. But no question arises in this case as to the rights of the riparian proprietors among themselves, for no title is made by either party through any one as riparian owner." In the same case in the lower court, Pallas, C. B. (p. 402), considered that the question whether "navigable" was synonymous with "tidal," so as to limit the public right of fishing to tide waters, would be worthy of grave consideration, if it were unfettered by authority; and Dowse, B., referring to the American decisions said (p. 412) that it would amount to an absurdity if a man, who owned a strip of land containing perhaps a quarter of an acre on the bank of the Mississippi, should be entitled to a several fishery extending three-quarters of a mile out to the middle of the river. In the Exchequer Chamber (*Ibid.* p. 412, 434), White-side, C. J., declared the test afforded by the tide to be "an arbitrary rule, repugnant to reason, convenience, and the common sense of mankind."

sumably in the Crown; and, above that point, whether the soil at common law was in the Crown or the owners of the adjacent lands (a point perhaps not free from doubt), there was at least a jurisdiction in the Crown, according to Sir Matthew Hale, 'to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats.'¹ In either case, the right of the subject to pass up and down was complete."

§ 53. In view of the hesitation manifested in this country, especially in the Western States, to apply the English rule to our navigable fresh-water rivers and lakes, it should be remarked that the doctrine of Lord Hale and the early English decisions appears to be defective in that, according to the theory which they support, the general right of navigation in fresh waters is inconsistent with the private ownership of the soil beneath. Woolrych says:² "Waters flowing inland, where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailing test to apply in order to ascertain a common right, others have been attempted, and frequently without success." In England, prescription appears to be the ground upon which the right of navigation in these waters now depends,³ and in early decisions in this country it was held that fresh rivers, though navigable in fact, are not open to the public unless they have been long used for navigation, or have been declared highways by the legislature.⁴ This is contrary to Lord Hale.

¹ Citing Hale, *De Jure Maris*, c. 2.

² Woolrych on Waters, 31.

³ *King v. Montague*, 4 B. & C. 96; *Bristow v. Cormican*, 3 App. Cas. 641; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Coulson & Forbes on Waters*, 92, 93, 441; *Addison on Torts* (5th Eng. ed.), 561.

⁴ In *Berry v. Carle*, 3 Greenl. 269,

274, Weston, J., said, in speaking of the public right of navigation in the Saco River above the tide: "In the case of *Dunbar v. Vinal*, in the Supreme Court of Massachusetts in 1801, it was decided 'that the navigable waters of the country were a common privilege for passing upon them, and that the plaintiff had no right to intercept it by a dam.' But in the case of *Spring v. Chase et al.*, it was, in

who makes no distinction in this respect between tidal and fresh navigable rivers, and says that both are common highways and *prima facie publici juris*, whether they are fresh or salt, whether they flow and reflow or not.¹ If proof of long-continued exercise of the right to pass over the soil covered by the water were required in newly settled colonies and territories, in which the rivers are often the chief means

1799, decided by the same Court to be otherwise, where the party owns the adjoining land, and no tide ebbs and flows. In that case the plaintiff, being the owner of the adjoining lands, erected a bridge over Saco River, above, but near, the great falls and above the tide waters. The defendants threw down the bridge as a nuisance, for which they were called upon to answer in trespass. The plaintiff had judgment because, in the opinion of the Court, those were not navigable waters where the bridge was built, although the river was there convenient for boats and rafts, and for many miles above. These cases are not reported at large, but are briefly stated in 2 Dane's Abridgment, 696. Notwithstanding the Saco, above the tide waters, may not be open to the public as a highway of common right, yet by long usage as such, it may acquire this character. In the case before us, it is not stated as a fact that the Saco River is, at the place where the injury complained of was done, a public highway. . . . The facts are imperfectly exhibited if the river has, in the place in question, by long usage, the attributes of a public highway, and the ground taken by the counsel for the plaintiffs in error is therefore insufficient to entitle them to a reversal of the judgment." Evidence of long-continued public use was also held to be essential or material in *Scott v. Willson*, 3 N. H. 321, 325; *State v. Gilmanston*, 14 N. H. 467, 478; *Browne v. Scofield*, 8 Barb. 239; *Shaw v. Crawford*, 10 Johns. 236; *Palmer v.*

Mulligan, 3 Caines, 307, 312. And see *McManus v. Carmichael*, 3 Iowa, 1, 31. In the case of *Brown v. Chadbourne*, 31 Maine, 9, 21, the court considered the view expressed in *Berry v. Carle* erroneous, Wells, J., saying: "If a stream could be subject to public servitude by long use only, many large rivers in newly settled States, and some in the interior of this State, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers, which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases, is, whether a stream is inherently, and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs. When a stream possesses such a character, then the easement exists, leaving to the owners of the bed all other modes of use not inconsistent with it." See, also, *Carter v. Thurston*, 58 N. H. 104, 106; 54 N. H. 545, 549, overruling the *dicta* in *Scott v. Willson*, above cited; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Brubaker v. Paul*, 7 Dana, 428; *State v. Thompson*, 2 Strob. (S. C.) 12; *Hubbard v. Bell*, 54 Ill. 110; *Ellis v. Carey*, 30 Ala. 725, *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528.

¹ Hale, *De Jure Maris*, c. 1, 2, 3; *Hargrave's Law Tracts*, 6, 8, 9; *Williams v. Wilcox*, 8 Ad. & El. 314, 333, referred to *ante*, § 52.

of transportation and travel, and the riparian owners were permitted, in the absence of such evidence, to obstruct large rivers by dams, bridges, or booms, or to demand compensation from navigators, it would amount to a serious grievance.

§ 54. Nature is competent, it has been said, to make a navigable river without the aid of the legislature;¹ and it is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact.² This right of navigation is distinct from the public right of fishery, which may or may not exist in the same waters.³

§ 55. In theory, it would seem that prescription, as suggested by Woolrych, is the only ground upon which the right of navigation can be reconciled with the private ownership of the soil. The public right is said to be an easement to which the title of the adjoining owners is subjected, as in the case of a highway on the land,⁴ but the analogy is imperfect.

¹ *Martin v. Bliss*, 5 Blackf. 35.

² *Hale*, *De Jure Maris*, c. 2, 3; *Williams v. Wilcox*, 8 Ad. & El. 314, 333; *Barney v. Keokuk*, 94 U. S. 342; *Pound v. Turk*, 95 U. S. 459; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430, 442; *Carter v. Thurston*, 58 N. H. 104, 106; *Thompson v. Androscoggin Co.*, 54 N. H. 545; 58 N. H. 108; *Brown v. Chadbourne*, 31 Maine, 9; *Moor v. Veazie*, 32 Maine, 343; *Spring v. Russell*, 7 Greenl. 273, 290; *Wadsworth v. Smith*, 11 Maine, 278; *Adams v. Pease*, 2 Conn. 481; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 199, 202; *Avery v. Fox*, 1 Abb. U. S. 246; *Palmer v. Mulligan*, 3 Caines, 307; *People v. Platt*, 17 Johns. 195, 211; *Hooker v. Cummings*, 20 Johns. 90; *Canal Commissioners v. People*, 5 Wend. 423; *Morgan v. King*, 35 N. Y. 454; 30 Barb. 9; 18 Barb. 277; *Munson*

Hungerford, 6 Barb. 265; *Rowe v. Titus*, 1 Allen (N. B.), 326; *Essex v. McMaster*, 1 Kerr (N. B.), 501; *Boissonnault v. Oliv. Stuart* (Low. Can.), 565; *Moore v. Sanborne*, 2 Mich. 519; *Lorman v. Benson*, 8 Mich. 18; *Rhodes v. Otis*, 33 Ala. 578, 596; *Cox v. State*, 3 Blackf. 193; *Weise v. Smith*, 3 Oreg. 445, 448; *Healy v. Joliet Railroad Co.*, 2 Ill. App. 435; *People v. St. Louis*, 5 Gilman, 351; *Godfrey v. Alton*, 12 Ill. 29; *Memphis v. Overton*, 3 Yerger, 389; *Elder v. Burrus*, 6 Humph. 358; *Stuart v. Clark*, 2 Swan, 15; *Sigler v. State*, 7 Baxter, 493; *Yates v. Judd*, 18 Wis. 118; *Hickok v. Hine*, 23 Ohio St. 523; *Selman v. Wolfe*, 27 Texas, 68.

³ See *Leconfield v. Lonsdale*, L. R. 6 C. P. 665; *People v. Platt*, 17 Johns. 195, 211.

⁴ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5

In the case of *Ball v. Herbert*,¹ Buller, J., said: "Callis compares a navigable river to a highway, but no two cases can be more distinct. In the latter case, if the way be founde-rous and out of repair, the public have a right to go on the adjoining land; but, if a river should happen to be choaked up with mud, that would not give the public a right to cut another passage through the adjoining lands." A road or highway by land is limited in locality,² being confined within specific lines and not extending over tracts of land generally; and the public right to use it arises by statute, or by dedication, prescription, contract, or by survey and plat. If by statute, compensation must be made; in other cases the consent of the owner is required.³ But, as the right of navigation extends to all waters which have a natural capacity for such use, there is a general presumption of an easement,⁴ and the owners of the adjoining lands can neither prevent its acquisition or exercise,⁵ or obtain compensation for such appropriation of private property to the public use. The anomalous nature of this doctrine is further illustrated

Pick. 199; *Hooker v. Cummings*, 20 Johns. 90; *Varick v. Smith*, 9 Paige, 137, 143; *Morgan v. King*, 35 N. Y. 454; *Chenango Bridge Co. v. Paige*, 23 Alb. L. Jour. 15; *Young v. Harrison*, 6 Ga. 130, 141; *McCullough v. Wall*, 4 Rich. (S. C.) 68; *Ensminger v. The People*, 47 Ill. 384; *Braxton v. Bressler*, 64 Ill. 488; *The Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 S. & M. 366.

¹ *Ball v. Herbert*, 3 T. R. 253, 263; *Williams v. Wilcox*, 8 Ad. El. 314.

² See, *e. g.*, *Gentleman v. Soule*, 32 Ill. 271; *Plimpton v. Converse*, 44 Vt. 158; *Hart v. Connor*, 25 Conn. 331; *Jones v. Percival*, 5 Pick. 485; *Holmes v. Seely*, 19 Wend. 507; *Brice v. Randall*, 7 Gill & J. 349.

³ See, *e. g.*, as illustrating the text as to highways, *State v. Kansas City Railway Co.*, 45 Iowa, 139; *State v. Welpton*, 34 Iowa, 144; *State v. Tucker*, 36 Iowa, 485; *Detroit v. Detroit Railway Co.*, 23 Mich. 173; *Cemetery*

Association v. Meninger, 14 Kansas, 312; *Oliphant v. Atchison Co.*, 13 Kansas, 386; *State v. O'Laughlin*, 19 Kansas, 504; *Belleville v. Stookey*, 33 Ill. 441; *Grube v. Nichols*, 36 Ill. 92; *Smith v. Flora*, 64 Ill. 93; *Plimpton v. Converse*, 44 Vt. 158; *Johnson v. Stayton*, 5 Harr. (Del.) 448; *Melvin v. Whiting*, 13 Pick. 184.

⁴ There appears to be no analogy for a general presumption of an easement. Mr. Phear says there cannot be such a presumption. *Phear's Rights of Water*, 15, note.

⁵ An easement cannot be supported on the ground of long user, unless it was capable of prevention, or actionable at some time by the owner of the servient tenement. *Sturges v. Bridgman*, 11 Ch. D. 852; *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Mitchell v. Mayor*, 49 Ga. 19; *Webb v. Bird*, 13 C. B. n. s. 841; *Chasemore v. Richards*, 7 H. L. Cas. 349.

by a decision in Michigan, in which it was held that the right of navigation in a private fresh river, though nominally an easement, is not, like other easements, an incorporeal hereditament or real estate; and that an action for obstructing this right, though local at common law, was not so under a statute which made actions on the case, for injuries to real estate, local, and other actions transitory.¹

§ 56. In this country the doctrine of private ownership has been generally recognized as the rule of the common law; but it has been held to be inapplicable to the condition of many of those States in which the inland rivers are large.² It is in force in all the New England States,³ where the fresh rivers are comparatively unimportant, although in Rhode Island it does not appear to have been directly passed upon.⁴

¹ *Barnard v. Hinckley*, 10 Mich. 458.

² *Post*, §§ 64, 75.

³ In Connecticut, *Adams v. Pease*, 2 Conn. 481; *Bissell v. Southworth*, 1 Root, 269; *Warner v. Southworth*, 6 Conn. 471, 474; *Chapman v. Kimball*, 9 Conn. 38, 41; *Enfield Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 40, 63; *Mill River Woollen Manuf. Co. v. Smith*, 34 Conn. 463. In New Hampshire, *Scott v. Willson*, 3 N. H. 321; *Rix v. Johnson*, 5 N. H. 520; *State v. Gilmanton*, 9 N. H. 461; 14 N. H. 467; *Greenleaf v. Kilton*, 11 N. H. 530; *State v. Canterbury*, 28 N. H. 195; *Boscawen v. Canterbury*, 23 N. H. 189; *Nichols v. Suncook Manuf. Co.*, 34 N. H. 345; *Kimball v. Schoff*, 40 N. H. 190; *Clement v. Burns*, 43 N. H. 609; *Norway Plains Co. v. Bradley*, 52 N. H. 86. (In *Nichols v. Suncook Manuf. Co.* 34 N. H. 345, it was held that adverse possession of land bordering upon a river not navigable, gives title to the thread of the stream.) *Claremont v. Carlton*, 2 N. H. 369; *Thompson v. Androscoggin Co.*, 54 N. H. 548; 58 Id. 108; *Carter v. Thurston*, 58 N. H. 104; *State v. Canterbury*, 28 N. H. 195. In Vermont, *Fletcher v. Phelps*,

28 Vt. 257, 262. In Maine, *Berry v. Carle*, 3 Maine, 269; *Morrison v. Keen*, 3 Maine, 474; *Lincoln v. Wilder*, 29 Maine, 169; *Spring v. Russell*, 7 Maine, 273, 290; *Spring v. Seavey*, 8 Maine, 138; *Wadsworth v. Smith*, 11 Maine, 278; *Bradley v. Rice*, 13 Maine, 198, 201; *Nickerson v. Crawford*, 16 Maine, 245; *Brown v. Chadbourn*, 31 Maine, 9; *Knox v. Chaloner*, 42 Maine, 150; *Moor v. Veazie*, 32 Maine, 343; 31 Maine, 360; 14 How. 100; *Bradford v. Cressey*, 45 Maine, 9; *Strout v. Millbridge Co.*, 45 Maine, 76; *Veazie v. Dwinell*, 50 Maine, 479, 484; *Granger v. Avery*, 64 Maine, 292; *Holden v. Robinson Manuf. Co.*, 65 Maine, 215; *Pejepscot Proprietors v. Cushman*, 2 Maine, 94. For the Massachusetts cases, see the next note.

⁴ See *Hughes v. Providence Railroad Co.*, 2 R. I. 508, 512; *Olney v. Fenner*, Id. 211, 214. See opinion of Story, J., in *Tyler v. Wilkinson*, 4 Mason, 397, which related to the Pawtucket River. *Storer v. Freeman*, 6 Mass. 435, 438; *Hatch v. Dwight*, 17 Mass. 289, 298; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Chapin*, 5 Pick. 199; *Waterman v.*

In an early case¹ in Massachusetts, Parker, C. J., said:² "The common-law right of public property, restricted as it seems to be except for easement or right of way, may be found very inconvenient in its application to many of the magnificent fresh-water rivers of the United States, which are navigable for small vessels and boats much above the flux of the tide, especially by the aid of steam power so rapidly getting into use." The rule has been held applicable to the Connecticut River above the tide, in Connecticut,³ Massachusetts,⁴ and New Hampshire,⁵ and to the Penobscot⁶ and Saco⁷ Rivers in Maine. In Vermont, Lake Champlain is public property, and the creeks and streams which empty into that lake, so far as they are ordinarily of the same level as the lake, and rise and fall with its waters, are held to be public also; and private conveyances of lands bounding upon such creeks and streams pass title only to the water's edge, or to the low-water mark, if there is a definite low-water line.⁸

§ 57. In New York, the question has given rise to conflict of decision.⁹ The later decisions follow the common-law

Johnson, 13 Pick. 261, 265; Hopkins Academy v. Dickinson, 9 Cush. 544, 547; Commonwealth v. Alger, 7 Cush. 53, 90, 97; McFarlin v. Essex Co., 10 Cush. 304, 309; Blood v. Nashua Railroad Co., 2 Gray, 137, 139; Boston v. Richardson, 13 Allen, 146, 154; 105 Mass. 351, 355; Commonwealth v. Vincent, 108 Mass. 441, 447; 1 Dane's Abr. ii., 692, § 13; Knight v. Wilder, 2 Cush. 199; King v. King, 7 Mass. 496.

¹ Ingraham v. Wilkinson, 4 Pick. 268. See, however, the opinion of the same judge in Commonwealth v. Chapin, 5 Pick. 199, 202.

² Ibid. 272.

³ Adams v. Pease, 2 Conn. 481, and cases above cited.

⁴ Commonwealth v. Chapin, 5 Pick. 199; Bardwell v. Ames, 22 Pick. 333; Hopkins Academy v. Dickinson, 9 Cush. 544, 547.

⁵ State v. Canterbury, 28 N. H. 195. In this case a town was bounded upon the river.

⁶ Veazie v. Dwinel, 50 Maine, 479.

⁷ Berry v. Carle, 3 Greenl. 260; Spring v. Russell, 7 Greenl. 273, 290.

⁸ Fletcher v. Phelps, 28 Vt. 257, 262; Jakeway v. Barrett, 38 Vt. 316, 323; Austin v. Rutland Railroad Co., 45 Vt. 215; Newton v. Eddy, 23 Vt. 319.

⁹ Palmer v. Mulligan, 3 Caines, 307; People v. Platt, 17 Johns. 195; Hooker v. Cummings, 20 Johns. 90; Canal Appraisers v. People, 5 Wend. 423; People v. Canal Appraisers, 13 Wend. 355; 17 Wend. 571; People v. Seymour, 6 Cowen, 579; *Ex parte* Jennings, 6 Cowen, 518, and notes; *Ex parte* Tibbetts, 6 Cowen, 551; 5 Wend. 423; People v. Seymour, 6 Cowen, 518; Arthur v. Case, 1 Paige, 44, 75, 447; 3 Wend. 632; Jackson v. Hal-

rule,¹ which has been held applicable to the Hudson,² the Oswego,³ and the Genesee⁴ Rivers. The Mohawk River seems, however, to form an exception. In the case of *The People v. Canal Appraisers*,⁵ Davis, J., delivered an elaborate opinion, in which he held that this river was public property, upon two grounds: (1) that the word "navigable" denotes merely navigability in fact, and is so employed in the early authorities; (2) that the course of the State's legislation had been such as to amount to a reservation for public purposes of the Mohawk and other navigable rivers of the State.⁶ This decision does not appear to have been expressly overruled in its application to the particular river,⁷ but the first ground on which the judgment proceeds cannot now be regarded as tenable.⁸ The Niagara River, which is the national boundary between the United States and Canada,

stead, 5 Cowen, 216; *Varick v. Smith*, 5 Paige, 137; 9 Id. 547; *Starr v. Child*, 20 Wend. 149; 5 Denio, 599; 4 Hill, 369; *Jackson v. Halstead*, 5 Cowen, 216; *Jackson v. Louw*, 12 Johns. 252; *Munson v. Hungerford*, 6 Barb. 265; *Luce v. Carey*, 24 Wend. 451; *Commissioners v. Kempshall*, 26 Wend. 404; *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 523; *Browne v. Scofield*, 8 Barb. 239; *Morgan v. King*, 35 N. Y. 454; 18 Barb. 277; 30 Id. 9; *Mott v. Mott*, 68 N. Y. 246; *Pierrepont v. Loveless*, 72 N. Y. 211, 216; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178. See also *Shaw v. Crawford*, 10 Johns. 236; *Furman v. New York*, 5 Sand. 16; *Curtis v. Keesler*, 14 Barb. 511; *Lownes v. Dickerson*, 34 Barb. 586, 592; *People v. Allen*, 1 Lans. 248; *Champlain Railroad Co. v. Valentine*, 19 Barb. 484, 489. As to the legislation in this State, bearing upon the ownership of rivers and restricting the power of the commissioners of the land office so that they can convey the soil of navigable rivers and lakes only to the adjacent owners, see *Canal Appraisers v. People*, 17

Wend. 571, 577; *Gould v. Hudson River Railroad Co.*, 2 Selden, 522; 1 Greenl. Laws, 280; Laws 1815, c. 199, p. 201; 1 Rev. Laws, 293, § 4; Laws of 1850, c. 283, p. 621; 1 Rev. Stats. 208, § 67; 1 Rev. Stats. (5th ed.), 552, § 82.

¹ See the cases of *Chenango Bridge Co. v. Paige*; *Pierrepont v. Lovelace*; *Mott v. Mott*; *Morgan v. King*, above cited.

² *Palmer v. Mulligan*, 3 Caines, 307; *Ex parte Tibbits*, and *Ex parte Rogers*, 6 Cowen, 551, note; *Harris v. Thompson*, 9 Barb. 350; *Walton v. Tift*, 14 Barb. 216, 219.

³ *Varick v. Smith*, 9 Paige, 547; 5 Paige, 137.

⁴ *Commissioners v. Kempshall*, 26 Wend. 404.

⁵ *People v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 398.

⁶ 33 N. Y. pp. 466, 467, 475, 500.

⁷ See *Crill v. Rome*, 47 How. Pr. 398; *People v. Gutches*, 48 Barb. 656, 667; *Canal Appraisers v. People*, 17 Wend. 571, 608; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.

⁸ See *ante*, §§ 42, 48, notes.

also forms another exception, under the decisions in New York, to the application of the common-law rule in that State.¹

§ 58. The English rule is also adopted in New Jersey,² Delaware,³ Maryland,⁴ and Georgia.⁵ In the last named State it is held that, as the western bank of the Chattahoochee River, and not the river itself, is the boundary between that State and Alabama,⁶ the title of the riparian owners in Georgia, whose lands border upon this river, extends to the opposite bank, thus including the entire river-bed, and is not limited by the thread of the stream.⁷

§ 59. In South Carolina, the common-law rule was considered inapplicable to the condition of that State in the early case of *Cates v. Wadlington*;⁸ but, in the later case of *McCullough v. Wall*,⁹ the court said: "The rivers of our State are not of remarkable magnitude, and whether we adhere to the common-law definition, or consider as navigable

¹ *Kingman v. Sparrow*, 12 Barb. 201; *Canal Appraisers v. People*, 17 Wend. 571, 597.

² *Arnold v. Mundy*, 1 Halst. 1; *Gough v. Bell*, 2 Zab. 441, 490; *Bell v. Gough*, 3 Zab. 624; *Martin v. Waddell*, 3 Harr. 495; 16 Peters, 367; *Rundle v. Delaware Canal Co.*, 1 Wall. Jr. 275; 14 How. 80; *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 8, 631; *Society v. Low*, 2 C. E. Green, 20; *Cobb v. Davenport*, 32 N. J. 369.

³ *Delancy v. Boston*, 2 Harr. (Del.) 489; *Bickel v. Polk*, 5 Id. 325.

⁴ *Browne v. Kennedy*, 5 H. & J. 196; *Ridgely v. Johnson*, 1 Bland Ch. 316, note; *Baltimore v. McKim*, 3 Ibid. 453; *Binney's Case*, 2 Ibid. 99; *Casey v. Ingloes*, 1 Gill, 430; *Day v. Day*, 22 Md. 530, 537; *Goodsell v. Lawson*, 42 Md. 348; *Chapman v. Hoskins*, 2 Md. Ch. 485.

⁵ *Young v. Harrison*, 6 Ga. 130, 141; *Jones v. Waterlot Co.*, 18 Ga. 539; *Stanford v. Mangin*, 30 Ga. 355; *Hendrick v. Cook*, 4 Ga. 241. See, gen-

erally, *Cobb's Digest of the Laws of Georgia*, p. 902 *et seq.*

⁶ *Howard v. Ingersoll*, 13 How. (U. S.) 381; *Alabama v. Georgia*, 23 How. 505.

⁷ *Young v. Harrison*, 6 Ga. 130; *Jones v. Waterlot Co.*, 18 Ga. 539; *Moses v. Eagle Manuf. Co.*, 62 Ga. 455.

⁸ 1 McCord, 580.

⁹ *McCullough v. Wall*, 4 Rich. 68; *Boatwright v. Bookman*, Rice, 447; *Jackson v. Lewis*, Cheves, 259; *State v. Hickson*, 5 Rich. 447; *Witt v. Jecoat*, 10 Rich. 388; *Noble v. Cunningham*, McMullan, 289. In *Shands v. Triplet*, 5 Rich. Eq. 76, 79, the court say of the passage quoted in the text: "We entirely concur in this doctrine as to rivers altogether within the State, reserving our opinion as to rivers which may be conterminous between this and other States." See the numerous statutes upon the subject of rivers, in the ninth volume of the *State Statutes*.

all rivers that may be navigated by sea vessels, or all that are by nature floatable, we hesitate not to declare that this court, if it should feel itself at liberty, from considerations of public convenience, to assume legislative discretion in the matter, is not likely by any decision to extend the rules which by the common law are applicable to navigable rivers, to any stream above those falls which by nature obstructed the serviceable use of its water for transportation. Above those falls, as below, the right of the public to improve a river, and to use it as a highway, subsists; to that the proprietary right in the soil is subject; but so subject, the proprietary right exists in the owners to whom it has been granted, above the falls at any rate, as we may now safely say."

§ 60. In North Carolina, this rule has frequently been declared by the courts to be inapplicable to the condition of the country.¹ An early statute of this State provided that where a survey is made upon any navigable waters, the water shall form one side of the survey; and it recognized islands as distinct from the property in the lands adjoining these waters by prescribing the manner of entering and surveying them.² Under these provisions, all waters, whether fresh or salt, which are capable of navigation by sea-going vessels, are held to be navigable.³ Lands covered by such waters are not subject to entry and grant, under the entry laws of the State;⁴ but islands and rocks which are above the surface of the water, are vacant property, and subject to those laws.⁵ With respect to the right of fishing, it was held in

¹ *Wilson v. Forbes*, 2 Dev. 30; *Ingraham v. Threadgill*, 3 Dev. 59; *Collins v. Benbury*, 3 Ired. 277; 5 *Ibid.* 118; *Smith v. Ingram*, 7 Ired. 175; *Gilliam v. Bird*, 8 *Ibid.* 280, 284; *Fagan v. Armistead*, 11 *Ibid.* 433; *Lewis v. Keeling*, 1 *Jones Law*, 299; *State v. Dibble*, 4 *Ibid.* 107; *Ward v. Willis*, 6 *Ibid.* 183; *State v. Glen*, 7 *Ibid.* 321; *Cornelius v. Glenn*, *Id.* 512; *Skinner v. Hettick*, 73 N. C. 53; *State v. Pool*, 74 N. C. 402, 407; *State v. Tomlinson*, 77 N. C. 528.

² *Ibid.*; *Ingraham v. Threadgill*, 3 Dev. 59.

³ *Ibid.*

⁴ *Tatum v. Sawyer*, 2 *Hawks*, 226; *Smith v. Ingram*, 7 Ired. 175.

⁵ *Jones v. Jones*, 1 *Hay*, 488; *McKenzie v. Hulet*, N. C. T. R. 181; 1 *Battle's Dig.* 404; *Ward v. Willis*, 6 *Jones*, 183.

an early case¹ in this State that neither the above statutory provisions, nor the absence of a grant of the fishery from the State, debar the owners of lands adjoining fresh navigable waters from claiming the common-law right of exclusive fishery opposite their lands to the thread of the stream. This appears, however, to be overruled by later adjudications in the same State.² In Tennessee, which was formerly included within the territory of North Carolina, the same rules prevail as to the ownership of the soil of navigable streams. Navigable waters are here considered to be those which, in the ordinary state of the water, are capable of navigation by vessels commonly used in commerce, whether foreign or inland, steam or sailing vessels; and riparian ownership on such waters is limited to the ordinary low-water mark.³

§ 61. In Virginia, early acts of the legislature prohibited grants of the banks, shores, and beds of rivers and creeks,⁴ and patents for land which form part of the bed of a navigable river are held to be void.⁵ These provisions seem to apply to navigable waters whether fresh or salt. It is held here, as elsewhere, that a conveyance of land bounded upon an unnavigable stream carries with it the title to the thread of the stream.⁶

§ 62. The earlier cases in Kentucky tend to reject the common-law rule, and are in favor of limiting the title of the riparian owner to low-water mark.⁷ But in the recent case

¹ *Ingraham v. Threadgill*, 3 Dev. 59.

² See the cases cited in the preceding note.

³ *Elder v. Burrus*, 6 Humph. 358; *Roberts v. Cunningham*, Martin & Yerg. 67; *Stuart v. Clark*, 2 Swan, 1; *Sigler v. State*, 7 Baxter, 493; *Martin v. Nance*, 3 Head, 649; *Memphis v. Overton*, 3 Yerger, 387; *Holbert v. Edens*, 5 Lea, 204.

⁴ 1 Rev. Code, pp. 142, 423; Code of Virginia, tit. 19, c. 62, § 1.

⁵ *Norfolk City v. Cooke*, 27 Gratt. 430; *Mead v. Haynes*, 3 Rand. 33, 36; *Home v. Richards*, 4 Call, 441. See, also, *French v. Bankhead*, 11 Gratt. 136; *Richards v. Hoome*, 2 Wash. (Va.) 36; *Wroe v. Harris*, Id. 126; *Martin v. Beverley*, 5 Call, 444.

⁶ *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Home v. Richards*, 4 Call, 441.

⁷ *Louisville v. United States Bank*, 3 B. Mon. 138, 143; *Thurman v. Mor-*

of *Berry v. Snyder*,¹ it was held that an early grant by the State of Virginia, which formerly possessed this territory, of land bordering upon the Ohio River, was to be construed by the laws of Virginia, and included the soil of the river to the centre of the main channel. The decision seems open to the following criticism: First, that by the law of Virginia, which is made the basis of the decision, the bed of a navigable river could not be granted;² second, that, as the jurisdiction and boundary line of the State extend to low-water mark on the northern shore,³ it would seem that there is no reason for limiting private titles to the thread of the river, and reserving the more remote portion of its bed for the State, but that, if the common-law rule is adopted, the title of the riparian owner would extend across the river, as has been held in similar cases in Georgia,⁴ which appear not to have been called to the attention of the court in *Berry v. Snyder*.

§ 63. The case of *The Magnolia v. Marshall*,⁵ in Mississippi, related to the right of soil between high and low-water mark on the Mississippi River, but the title to the

river, 14 B. Mon. 367; *Morrison v. Thurman*, 17 Id. 249; *Hawkesville v. Lander*, 8 Bush, 679. See also *Trustees v. Wagnon*, 1 A. K. Marsh. 243; *Cockrell v. McQuinn*, 4 Mon. 61; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Hart v. Rogers*, 9 B. Mon. 418, 422.

¹ 3 Bush, 266, 274. In this case, Williams, J., suggests the following reasons for a distinction between the title to the beds of fresh and salt waters: "So long as the ocean keeps its bed, and nature's present frame shall continue to exist, there will always be water up to the ocean's level in all those channels where the tide ebbs and flows, and this not dependent upon the water falling in rain; therefore, these channels are filled to ocean's level twice every twenty-four hours, and are constantly and uniformly navigable. Their navigability does not depend upon a season more or less rainy, but on the constant, unvarying

laws of nature, and will remain as surely navigable as the sea itself. Though not so deep, their surface level is the same; hence, without violence of expression or idea, they are called 'arms of the sea.' But it is different with all the great rivers of the earth above tide water. These are dependent for their supply from the clouds." In *Miller v. Hepburn*, 8 Bush, 326, it was held that *Berry v. Snyder* settled the rule in this State in favor of the doctrine of the common law.

² *Ante*, § 61.

³ *Post*, § 71; *Handley v. Anthony*, 5 Wheat. 379; *Conway v. Taylor*, 1 Black, 603; *Church v. Chambers*, 3 Dana, 278; *McFall v. Com.*, 2 Met. (Ky.) 396; *Fleming v. Kenny*, 4 J. J. Marsh. 158; *McFarland v. McKnight*, 6 B. Mon. 510.

⁴ *Ante*, § 58.

⁵ 30 Miss. 109. See also *Morgan v. Reading*, 3 S. & M. 366; *Commissioners v. Withers*, 29 Miss. 21.

river-bed was fully considered by the court. Harris, J., after referring to the authorities usually cited upon the question, reasons: First, that the term "navigable," as employed in the common-law authorities, has reference to the right possessed by all nations of navigating the ocean and its arms as common highways of mutual intercourse and commerce, and that inland rivers, though capable of navigation, are not navigable for all the world except by permission of the sovereign having jurisdiction over them;¹ second, that, under the law of nations, while the shores of the sea, rivers, and other waters forming boundaries between different states or nations, and also sounds, straits, and other arms of the sea which lead through the territory of one nation to that of another, or to other seas common to all nations, are subject to the right of innocent passage,² not as controlled by the nearest nation, but according to the mutual convenience of the parties interested;³ yet rivers and waters, which are not national boundaries and do not constitute channels of international communication, including inland lakes and rivers, ports, harbors, and bays, the entrance of which can be defended, are a part of the adjacent nation and wholly subject to its control;⁴ and that the term "navigable," as used in the common law, was thus borrowed from the law of nations, and has reference to the right of free navigation of the ocean and of the greater arms of the sea, not *mare clausum*, and to the usage of civilized nations extending this right as far as the sea ebbs and flows, restraining grants of land by the sovereign power beyond low-water mark on tide waters and leaving the water and soil, below ordinary high-water mark, subject to the public easement as a common highway for all nations; third, that in respect to fresh rivers which are intra-

¹ 39 Miss. p. 117. The reasoning of the court in this case has been approved in Wisconsin. *Olson v. Merrill*, 42 Wis. 203, 212; *Diedrich v. Northwestern Railway Co.*, 42 Wis. 248, 263.

² Citing Vattel's Law of Nations, bk. 2, pp. 180, 181; Wheaton's Int. Law, p. 243, § 12.

³ Citing Wheaton's Int. Law, pp. 243, 244, §§ 13, 14; p. 251, § 18; p. 255, § 19; Vattel's Law of Nations, p. 129, §§ 290-292.

⁴ Citing Wheaton's Int. Law, p. 256, § 19; Vattel's Law of Nations, p. 129, §§ 290-292.

territorial, whether they are capable of navigation or not, "the right of navigation was always wholly dependent on the will of the sovereign having the right of property in the soil; and, by the law of nations, such streams were 'not navigable' for other nations, except by treaty or special permission of the local sovereign. Hence they are called 'not navigable,' in contradistinction to such waters, etc., as were common to all nations."¹ The opinion proceeds:² "In the construction of grants of land made to the citizen and bounded on these fresh-water streams, over which the sovereign had exclusive title and jurisdiction, there could be no question of the right of the sovereign to part with the title of the soil to the grantee. It became, therefore, a mere question of intention. The courts of common law, applying to these deeds or grants the ordinary rules of construction, in cases of doubt, construed the grant most strongly in favor of the grantee; and, upon the further presumption that the grantor, in parting with his land on both sides of a watercourse, whether capable of navigation or not, could scarcely have intended, without an express clause to that effect, to reserve the watercourse to himself, have held with unvarying uniformity in England, from the earliest period down to this day, that such grants bounded on or by or at such watercourse conveyed to the respective riparian grantees the right of soil and the use of the water (subject to the *jus publicum*) *usque ad filum aquae*."³ "It is certain that under the deed of cession from

¹ p. 120.² p. 120.

³ Mr. Houck (on Rivers, 59) makes the following criticisms upon this passage: (1) That an argument based upon the hypothesis that the title of the sovereign to the bed of a river is undoubted, while doubtful as to the seashore, and the inference that the sovereign therefore disposed of the bed of the river, although no express grant is shown, are entirely ideal, in view of the fact that in England the sovereign has from time immemorial granted parts of the seashore to individuals. (2) That the grants in England construed so as to go to the

centre of the stream, were not of lands upon streams navigable in fact at the time such a construction was placed upon the grants, and the interest of the public had not attached prior to the grant from the sovereign. (3) That grants from the government are not strongly construed in favor of the grantee. (4) Especially is this so in the States carved out of the Territories of the Union, where all lands sold by the government are bounded by mathematical lines which limit the purchaser's rights. (5) That the position that the public could scarcely have intended to reserve the stream

Georgia, as well as the several acts and ordinances in reference to the free navigation of the Mississippi River, as a common highway, no grant could have been made here, interfering with this great public right.¹ There is, therefore, no inconsistency, but, on the contrary, as before suggested, perfect harmony between the *jus privatum* of riparian ownership in public fresh-water streams to the middle of the river and the *jus publicum* of free navigation thereof. The soil is granted to the riparian proprietor, subject to this public easement." With reference to the opinion delivered by Tilghman, C. J., in the Pennsylvania case of *Carson v. Blazer*,² the opinion proceeds:³ "He seems not to apprehend that the great principle lying at the foundation of the rule ('that a grant of land, bounded on the ocean or its arms, or tide water, extends only to ordinary high-water mark') is that a sovereign making such grant, by the laws and comity of nations, has no power to appropriate to private use what is not only *juris publici*, or common to the whole world, and therefore incapable of ownership, but what lies beyond his territorial dominion." The learned judge concludes⁴ that the plaintiff derived his title to the property in question under the common law; and that only under the common-law doctrine as to fresh-water streams could the deed of cession by Georgia to the United States and the act of Congress organizing the Mississippi Territory and the subsequent act admitting that Territory as a State, which acts referred to the Mississippi River as a boundary, be held to pass to Mississippi the right of soil and jurisdiction to the middle of the river; that the whole legislation of Mississippi in relation to her western boundary was founded upon this rule of the common law, and that its right of jurisdiction and property to the thread of the river had been frequently asserted and acted on. Handy, J., concurred in the conclusion reached, without assenting to all the views expressed in the above opinion.

without an express clause, is opposed to the United States statutes declaring navigable rivers public highways and unnavigable streams common to the opposite shoreholders.

¹ p. 122.

² 2 Binney, 475; *post*, § 65.

³ 39 Miss. p. 123.

⁴ pp. 133-135.

§ 64. With respect to the deed of cession from Georgia to the United States, and the acts of Congress referred to in this opinion, it may be remarked that, under the decisions of the Supreme Court of the United States, Mississippi acquired the jurisdiction and property in its navigable waters;¹ and it seems equally clear that by the rules both of the law of nations and of the common law applicable to boundary rivers, the line of separation, if not controlled by treaty or the terms of the grant, would be fixed at the middle of the channel, irrespective of the question whether the water was salt or fresh.² The suggestion, therefore, that Congress adopted the common-law rule in fixing the western boundary of the State does not necessarily affect the question whether the riparian owner, upon the one hand, or the State, upon the other, owns the river-bed. With respect to the law of nations, the opinion proceeds upon grounds not clearly established, and disregards the distinction between those tide waters which are, and those which are not, within the territory of a nation. The territory of England extends to low-water mark on the external coast,³ and between that

¹ *Martin v. Waddell*, 16 Peters, 367; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Goodtitle v. Kibbe*, 9 Ib. 471. "These cases," say the court, in *Barney v. Keokuk*, 94 U. S. 324, 338, "related to tide waters, it is true; but they enunciate principles which are equally applicable to all navigable waters." See, also, *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669.

² Lawrence's *Wheaton's Int. Law* (2d ed.), pp. 342, 346-360; *Wheaton's Law of Nations*, 577-583; *Vattel*, bk. 1, c. 22, §§ 266, 274; *Marten, Precis du Droit*, bk. 2, c. 1, § 39; *Bluntschli, Int. Law*, 298, 299; *Handly v. Anthony*, 5 Wheat. 374; *The Apollon*, 9 Wheat. 362, 369; *The Fame*, 3 Mason, 147; *Cornfield v. Coryell*, 4 Wash. C. C. 384; *Bennett v. Boggs*, Bald. 60; *Mississippi Railroad Co. v. Ward*, 2 Black, 485; *An Open Boat*, 1 Ware, 26, 28; *Spears v. State*, 8 Texas App. 467; *Stillman v. White Rock Manuf. Co.*, 3

Wood. & M. 538; *Missouri v. Kentucky*, 11 Wall. 395, 401; *Gilbert v. Moline Water Power Co.*, 19 Iowa, 319; *State v. Mullen*, 35 Iowa, 199; *Canal Appraisers v. People*, 17 Wend. 571, 597; *Mahler v. New York Transportation Co.*, 35 N. Y. 352; *People v. Central Railroad Co.*, 48 Barb. 478; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21, 30; *Brown v. Camden Railroad Co.*, 83 Penn. St. 316; *Myers v. Perry*, 1 La. Ann. 372; *Phillips v. People*, 55 Ill. 429; *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631. If a nation possesses both banks of a river, and grants to another nation the territory on one side only, it retains the river within its domain, and the grantee takes to low-water mark only. *Handly v. Anthony*, 5 Wheat. 374.

³ *Regina v. Keyn*, 2 Ex. D. 63; *ante*, §§ 11, 12.

line and the high-water mark the Crown's right of property is subject to the *jus publicum* of its subjects, but has never been regarded in that country as burdened with an easement in favor of foreign nations.¹ There appears, also, to be no authority for the suggestion that the technical use of the word "navigable" is derived from the law of nations; nor could it have been derived from a system which recognizes none of the peculiar distinctions of the common law² with respect to the admiralty jurisdiction and the *jus privatum*³ of the Crown in navigable waters. Under the law of nations, the subjects of foreign powers have no greater rights in tidal rivers which are exclusively within the territory of one nation, and do not flow through distinct jurisdictions, than in large fresh-water rivers similarly situated.⁴ That law does not distinguish between rivers by the absence or presence of the tide;⁵ and it admits of little doubt that every State has full sovereignty, from their source to the sea, over all waters which are wholly within its territory and do not lead to other large waters, as well in places where the water is salt as where it is fresh.⁶ The reasoning of Harris, J., violates these principles, which are too clearly supported by authority to admit of serious question as to their correctness.

§ 65. In Pennsylvania the English doctrine has always been rejected.⁷ The early case of *Carson v. Blazer*⁸ pro-

¹ See authorities cited *ante*, §§ 21, 28.

² *Ante*, §§ 8, 12.

³ *Ante*, §§ 17-19.

⁴ Lawrence's *Wheaton's Int. Law* (2d ed.), 342, 346-360; Hall's *International Law*, 113, 114, and authorities above cited in this section, as to boundary rivers between States.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Carson v. Blazer*, 2 Binney, 475; *Commonwealth v. Fisher*, 1 Penn. 462; *Cooper v. Smith*, 9 S. & R. 26; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Hart v. Hill*, 1 Whart. 124;

Ball v. Slack, 2 Whart. 508; *Covett v. O'Connor*, 8 Whart. 470; *Bird v. Smith*, 8 Watts, 434; *Dalrymple v. Mead*, 1 Grant's Cas. 197; *Union Canal Co. v. Landis*, 9 Watts, 228; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346; *Jones v. Janney*, 8 Watts & S. 436; *Johns v. Davidson*, 16 Penn. St. 512; *Bailey v. Miltenberger*, 31 Penn. St. 37; *Baker v. Lewis*, 33 Penn. St. 301; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194; *Solliday v. Johnson*, 38 Penn. St. 380; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Mc-*

⁸ 2 Binney, 475.

ceeded upon three grounds: first, that such a rule was inapplicable to the condition of that State; second, that the title to the river-beds which Penn acquired by grant from the Crown of England either was not alienated in his grants of river lands, but was retained for the public benefit, or if such property was included in his concessions, which declared that all rivers, etc., shall be freely enjoyed, "and wholly by the purchasers into whose lots they fall," yet these concessions were to be construed as personal and as confined to the first purchaser; third, that any exclusive private rights in the rivers of the State were inconsistent with its statutes and usages. In subsequent cases¹ stress was laid upon the fact that islands in navigable fresh-water rivers, which, at the common law, would belong to the riparian owners, together with the soil of the river, had been uniformly treated as distinct from the lands adjacent to the banks both under the proprietary and State governments, being sold by special contract and for higher prices than the ordinary river lands. The rule thus founded has been applied to the large fresh rivers of the State, such as the Susquehanna and its principal branches, and the Allegheny, Ohio, and Monongahela Rivers. In these the fishery is a common right, and grants from the State, or between private persons, of lands bordering upon them, when calling for the river as a boundary, do not extend

Keen v. Delaware Canal Co., 49 Penn. St. 424; *Stover v. Jack*, 60 Penn. St. 339; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Wainwright v. McCullough*, 63 Penn. St. 66; *Zug v. Commonwealth*, 70 Penn. St. 138; *Poor v. McClure*, 77 Penn. St. 214; *Allegheny City v. Moorehead*, 80 Penn. St. 118; *Philadelphia v. Scott*, 81 Penn. St. 89; *Fisher v. Haldeman*, 20 How. 186; 1 Wall. Jr. 79, 297; *Simpson v. Neill*, 89 Penn. St. 183; *Rundle v. Delaware Canal Co.*, 14 How. (U. S.) 80; *Carson v. Blazer*, 2 Binney, 475.

¹ *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Hunter v. How-*

ard, 10 S. & R. 243; *Stover v. Jack*, 60 Penn. St. 339; *Wainwright v. McCullough*, 63 Penn. St. 66; *Poor v. McClure*, 77 Penn. St. 214, 220; *Allegheny City v. Moorehead*, 80 Penn. St. 118. With respect to private rights to the islands in the rivers of this State, see, also, *Moore v. Mundorff*, 4 Yeates, 209; *Shepherd v. Commonwealth*, 1 S. & R. 1; *McElear v. Elliot*, 14 S. & R. 242; *Johns v. Davidson*, 16 Penn. St. 512; *Allegheny City v. Reed*, 24 Ibid. 39; *Allegheny City v. Nelson*, 25 Ibid. 332; *Fuller v. Murphy*, 17 Pitts. L. J. 51; *Fisher v. Haldeman*, 20 How. (U. S.) 186; *Fisher v. Carter*, 1 Wall. Jr. 69.

the grantee's title beyond the ordinary low-water mark,¹ and will not include islands which are connected with the main land only in times of extraordinary drought.² So the wrongful diversion of a navigable stream-bed does not extinguish the right of the State to the soil or add to that of private persons.³ These rivers are often subject to marked fluctuations, and the title of the riparian owners to the shore, or space between high and low-water mark, is but a limited and qualified form of property. The public have the right of passage over it at high water, and the State may use it for purposes connected with the navigation of the stream without compensation to the owners of the adjoining lands, and may protect it from any use by such owners which is not strictly authorized.⁴ But, as the riparian owner's title extends, in the case of a navigable fresh river, to low-water mark, he is entitled to compensation from a railroad company, the construction of whose road causes the loss of a spring situated between high and low-water mark,⁵ although he could not recover for the loss of a spring similarly situated on the shore of a tidal river.⁶ In this State, as elsewhere, grants of land upon small unnavigable streams, following their courses and distances, pass the right of soil to the centre of the stream.⁷

¹ *Hart v. Hill*, 1 Whart. 137; *Ball v. Slack*, 2 Whart. 508; *Cooper v. Smith*, 9 S. & R. 26; *Naglee v. Ingersoll*, 7 Penn. St. 185; *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206; *Jones v. Janney*, 8 Watts & S. 436; *Stover v. Jack*, 60 Penn. St. 339, 343; *Freytag v. Powell*, 1 Whart. 536; *Hartley v. Crawford*, 33 Leg. Int. 24; s. c. 23 Pitts. L. J. 127; *Allegheny City v. Moorehead*, 80 Penn. 118.

² *Ibid.*; *Stover v. Jack*, 60 Penn. St. 339.

³ *Wainwright v. McCullough*, 63 Penn. St. 66; *Zug v. Commonwealth*, 70 Penn. St. 138.

⁴ *Stover v. Jack*, 60 Penn. St. 339; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Commonwealth v. Fisher*, 1 Penn. 462; *Zimmerman v.*

Union Canal Co., 1 Watts & S. 346; *Bailey v. Miltenberger*, 31 Penn. St. 37; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Wainwright v. McCullough*, 63 Penn. St. 66; *Wood v. Appal*, *Ibid.* 210; *Grant v. White*, *Ibid.* 271; *Poor v. McClure*, 77 Penn. St. 214, 219; *Hartley v. Crawford*, 81 Penn. St. (pt. 2), 478; *Philadelphia v. Scott*, 81 Penn. St. 80, 86; *Lacy v. Green*, 84 Penn. St. 514; *Cooper v. Smith*, 9 S. & R. 26; *Balliet v. Commonwealth*, 17 Penn. St. 206.

⁵ *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206.

⁶ *Commonwealth v. Fisher*, 1 Penn. 462.

⁷ *Coover v. O'Conner*, 8 Watts, 470; *Ball v. Slack*, 2 Whart. 538; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 190. In *Shrunk v. Schuyl-*

§ 66. Private rights in the navigable fresh-water rivers of this country, especially those in the Western and Southern States, are materially affected by a series of decisions in the Supreme Court of the United States, with respect to the admiralty jurisdiction. The rule by which the navigability of a river is determined by the ebb and flow of the tide,¹ appears to have been first used in England to define the jurisdiction of the admiral who, by the king's commission, was charged with the care and protection of the Crown's prerogative rights in the sea.² The early acts of Parliament,³ which limited the admiralty jurisdiction in civil cases to the "high seas," were usually construed by the common-law courts as meaning that portion of the sea which washes the open coast, and as prohibiting the exercise of this jurisdiction in the navigable arms and creeks of the sea which were within the countries, or *inter fauces terrae*,⁴ however large or capable of navigation by sea-going vessels such places might be.⁵ Such was considered to be the law of England when

kill Navigation Co., 14 S. & R. 71, 79, Tilghman, C. J., said: "I consider it settled in Pennsylvania, by the decision in *Carson v. Blazer*, that the owners of land on the banks of the Susquehanna and other principal rivers, have not an exclusive right to fish in the river immediately in front of their lands, but that the exclusive right to fisheries, in these rivers, is vested in the State, and open to all. It is unnecessary to enumerate at this time the rivers which may be called principal, but that name may be safely given to the Ohio, Monongahela, Youghiogony, Allegheny, Susquehanna, and its north and west branches, Juniata, Schuylkill, Lehigh, and Delaware." The effect of the compact of 1783, between the States of Pennsylvania and New Jersey, upon rights of fishery, navigation, and jurisdiction in the Delaware River, is discussed in *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631; *McKeen v. Delaware Division Canal Co.*, 49 Penn. St. 424; *Tinicum Fishing Co. v. Carter*,

61 Penn. St. 21; *Hart v. Hill*, 1 Whart. 124; *Commonwealth v. Frazer*, 2 Phila. 191; 5 Am. L. Reg. 167; *Cobb v. Bennett*, 75 Penn. St. 326; *Bennett v. Boggs*, Bald. C. C. 60; 4 Am. Law Reg. 582. See *Rundle v. Delaware Canal Co.*, 14 How. 80; 1 Wall. Jr. 275.

¹ *Sir Henry Constable's Case*, 5 Co. 106; *Leigh v. Burley*, Owen, 122; *De Lovio v. Boit*, 2 Gall. 398.

² *Sir Henry Constable's Case*, 5 Co. 106; 2 Bacon's Abr. tit. Court of Admiralty; 8 Id. tit. Prerogative, B. 3; *Callis on Sewers*, 39; 4 Inst. 124, 134; *Bains v. The James and Catherine*, Bald. C. C. 544, 547.

³ 13 Rich. II. c. 5; 15 Rich. II. c. 3; 2 Henry IV. c. 11; *Ramsay v. Allgre*, 11 Wheat. 611, 616.

⁴ *Ante*, § 5.

⁵ See *Leigh v. Burley*, Owen, 122; *The Public Opinion*, 2 Hagg. Adm. 398; *United States v. Wiltberger*, 5 Wheat. 106, note; *De Lovio v. Boit*, 2 Gall. 398; *Ins. Co. v. Dunham*, 11 Wall. 100; *Johnson v.*, 21 Bales of

the question arose in this country.¹ But the Judiciary Act of 1789² conferred upon the district courts exclusive cognizance of all civil causes of admiralty and maritime jurisdiction arising upon waters which are navigable from the sea, as well as upon the high seas; and in repeated decisions,³ the Supreme Court of the United States declined to adopt the English rule as the test for the interpretation of the grant in the Constitution which extended the power of the Federal courts "to all cases of admiralty and maritime jurisdiction." They considered that rule contrary to the general practice and understanding in this country, when the States were colonies, and held that the admiralty had, in this country, concurrent jurisdiction with the common-law courts in navigable rivers and arms of the sea, as far as the tide ebbed and flowed in them. In 1845 an act of Congress⁴ was passed

Cotton, 2 Paine, 601; 2 Bacon Abr. tit. Court of Admiralty; 4 Inst. 137; Bruce's Case, 2 Leach, C. C. 1093; 2 Brown's Civ. & Adm. Law, 92; Coombes's Case, 1 Leach, 388; 1 East, 367. The rule has since been enlarged by statute in England. See *The Diana*, 1 Lush. 539; *The Courier*, Ibid. 541; *The Griefswald*, Swab. Adm. 430.

¹ Ibid.; *Waring v. Clarke*, 5 How. (U. S.) 241; *Talbot v. The Commanders*, 1 Dall. 98; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *Ramsay v. Allegre*, 12 Wheat. 611; *The Huntress, Daveis*, 93, note.

² The ninth section of this act (1 Stat. at Large, p. 77) provides that the district courts of the United States "shall also have exclusive jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons' burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent

to give it; and shall have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States."

³ *The Thomas Jefferson*, 10 Wheat. 428; *Peroux v. Howard*, 7 Peters, 324; *The Orleans v. Phœbus*, 11 Peters, 175; *Waring v. Clarke*, 5 How. 441; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *The Huntress, Daveis*, 82; *Thomas v. Lane*, 2 Sumner, 1. See also *Rossiter v. Chester*, 1 Dougl. (Mich.) 154; *General Buell v. Long*, 18 Ohio St. 521; *Bullock v. The Lamar*, 1 West. Law, J. 444; *Respublica v. Davison*, 4 Yeates, 125. The admiralty jurisdiction does not extend over the land so as to include a cause of damage originating on the water, like a fire, and destroying storehouses upon a wharf. *The Plymouth*, 3 Wall. 20; *ante*, § 23.

⁴ 5 Stats. at Large, 726. This act provided that "the district courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons' bur-

extending the jurisdiction of the district courts to certain cases of a maritime nature in different States and Territories upon the lakes and navigable waters connecting the lakes. In the case of the *Genesee Chief*,¹ the question arose whether this act was constitutional, it being urged that it was not within that clause of the Constitution which empowers Congress to regulate commerce, and that if the constitutional grant of admiralty powers did not extend to waters above the tide, Congress could not extend it by legislation. The decision in this case overruled the earlier cases which limited the admiralty jurisdiction to tide waters, and the reasoning of Taney, C. J., who delivered the opinion of the court, proceeds upon the ground that the admiralty jurisdiction in this country extends to all waters, whether fresh or salt, where navigation aids commerce between different States, or with foreign nations. The learned judge said: "The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country, at the time the Constitution was adopted, was confined to the ebb and flow of the tide. Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it. In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide

then and upwards, enrolled and licensed for the coasting trade, and at the same time employed in business of commerce and navigation between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by

the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters within the admiralty and maritime jurisdiction of the United States."

¹ 12 How. 443, 454, 457.

water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence, the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters. At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States, the far greater part of the navigable waters are tide waters. And in the States which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition, having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably, here as well as in England, tide water must be the limits of admiralty power. And as the English definition was adopted in our courts, and

constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition, originally correct, was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters." If the Constitution were construed as measuring the jurisdiction of the admiralty by the tide, "then," continues the learned judge, "a line drawn across the River Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary, as well as unjust, and would make the Constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant." It was accordingly held that the great lakes and the waters connecting them were originally public waters, and within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.

§ 67. Such is now the established rule with respect to the admiralty jurisdiction of the United States Courts, a jurisdiction which is no longer limited in locality by the English rule, or by the acts of 1789 and of 1845.¹ The ebb and flow

¹ *Fretz v. Bull*, 12 How. (U. S.) 466; *Walsh v. Rogers*, 13 How. 283; *The New World*, 16 How. 469; *Ure v. Coffman*, 19 How. 56; *New York Steamboat Co. v. Calderwood*, 19 How. 245; *Jackson v. The Magnolia*, 20 How. 296; *Allen v. Newbury*, 21 How. 244; *Maguire v. Card*, 21 How. 248; *Nelson v. Leland*, 22 How. 48; *Philadelphia Railroad Co. v. Phil. Towboat Co.*, 23 How. 215; *The Commerce*, 1 Black, 574; *The St. Lawrence*, 1 Black, 522; *The Fashion*, 21 How. 244; *The Plymouth*, 3 Wall. 20, 34; *Ad. Hine v. Trevor*, 4 Wall. 555; 17 Iowa, 349; *The Moses Taylor*, 4 Wall. 411; *The Rock Island Bridge*, 6 Wall. 213; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *The Daniel Ball*, 10 Wall. 557; *The Cotton*

of the tide does not now constitute the test of the navigability of American waters, and those rivers are public and navigable in law which are navigable in fact. If, in their ordinary condition, by themselves, or by uniting with other waters, they form a continued highway, over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water, they are "navigable waters of the United States" within the meaning of the acts of Congress in which that phrase is employed.¹ This departure from the precedents of the English law tends to support the position that the large inland rivers of this country are public in respect to property. In *Barney v. Keokuk*,² in the Supreme Court of the

Plant, 10 Wall. 577; *Insurance Co. v. Dunham*, 11 Wall. 1; *Leon v. Garceran*, Id. 185; *Barney v. Keokuk*, 94 U. S. 324; *Ex parte Easton*, 95 U. S. 68, 72; *Steamboat Co. v. Chase*, 16 Wall. 522; 9 R. I. 419; *The Montello*, 20 Wall. 430; *The Lottawanna*, 21 Wall. 558; *United States v. Wilson*, 3 Blatch. 435; *The Sarah Jane*, 1 Lowell, 203; *Raymond v. The Ellen Stewart*, 5 McLean, 269; *Roberts v. Skolfield*, 3 Ware, 184; *The Avon*, 1 Brown Adm. 180; *The Illinois*, Ibid. 497; *Revenue Cutter No. 1*, Ibid. 76; *The General Cass*, Ibid. 334; *Eads v. The H. D. Bacon*, Newb. Adm. 274; *Parmlee v. The Charles Mears*, Ibid. 197; *Williams v. The Jenny Lind*, Ibid. 443; *McGinnis v. The Pontiac*, Ibid. 130; *The Flora*, 1 Biss. 29; *The Elmira Shepherd*, 8 Batch. 341; *The Mary Washington*, 1 Abb. (U. S.) 1; *Jones v. The Coal Barges*, 3 Wall. Jr. 53; *The Leonard*, 3 Ben. 263; *The Kate Tremaine*, 5 Ben. 69; *Wolverton v. Lacey*, 18 Law Rep. 672; *Scott v. The Young America*, 1 Newb. Adm. 101; *The Illinois*, 1 Brown Adm. 497; *McCormick v. Ives*, Abb. Adm. 418; *Dorr v. Waldron*, 62 Ill. 221; *The Josephine*, 39 N. Y. 10; 59 Barb. 501; *Vose v. Cockcroft*, 44 N. Y. 415; 45 Barb. 58;

Baird v. Daly, 4 Lans. 426; *General Buell v. Long*, 18 Ohio St. 521; *Petrel v. Dumont*, 28 Ohio St. 602; *Walters v. The Mollie Dozier*, 24 Iowa, 192; *Tug Boat Dorr v. Waldron*, 62 Ill. 221; *Merrick v. Avery*, 14 Ark. 370; *Morse v. Home Ins. Co.*, 30 Wis. 496.

¹ Ibid.

² 94 U. S. 324. The learned judge said: "The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines, where they have been applied, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign

United States, Bradley, J., in delivering the opinion of the court, observed that the confusion of navigable with tide waters, found in the monuments of the common law, had not only retarded the development of the admiralty jurisdiction, but had laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above the tide which were at variance with sound principles of public policy; and that, since the decision in the case of the *Genesee Chief*, there seemed to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.

§ 68. The ordinance of the Confederate Congress of July 13, 1787, entitled "An ordinance for the government of the territory of the United States north-west of the River Ohio," provided¹ that "the navigable waters, leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor." And by successive acts of Congress the navigable waters in the Western States and Territories have been declared to be public highways.² A similar provision

capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard v. Hagan*, 3 How. (U. S.) 212; and *Goodtitle v. Kibbe*, 9 How. (U. S.) 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of the *Genesee Chief*, 12 How. (U. S.) 443, has declared that the great lakes and other navigable waters of the country, above, as well as below, the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to

be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view, depended, as most cases must depend, on the local laws of the States in which the lands were situated."

¹ Art. IV.

² Acts of May 18 and June 1, 1796; March 3, 1803; March 26, 1804; Feb. 20 and March 3, 1811; April 8 and June 4, 1812; March 1 and May 8, 1817.

appears in the constitutions or statutes of the Western States bordering upon the Mississippi River with respect to that river,¹ and in the acts of Congress admitting them into the Union;² and in the early treaties between Great Britain or the United States upon, the one hand, and France or Spain upon the other, it was provided that the navigation of this river should be free throughout its course.³ These provisions may now be regarded as declaratory⁴ of the modern rule that all rivers which are capable of navigation in their natural condition are subject to public use for that purpose, whether in other respects they are held to be private property or not.⁵ But at the time the ordinance of 1787 was enacted, the question whether a river is a public highway was thought to be dependent upon proof of long user by the public.⁶ The ordinance may thus have been intended to prevent the application of so narrow a rule to the great rivers of the West,⁷ to amount to a reservation of the soil of these waters, and to render the rule of riparian ownership inapplicable to them.⁸

¹ See, for example, Const. of Wisconsin, Art. 9; Alabama Code of 1852, p. 267, § 1205, and of 1851, p. 126, § 389; Mississippi Code of 1851, p. 177; Tennessee Code (1858), p. 295; Gen. Stats. of Nebraska (1873), pp. 63, 65.

² See, e.g., 2 Stats. at Large, 349, 642, 703, 747, 546; 3 Ibid. 349, 543; 5 Ibid. 428, 431. The same is declared in the act of Congress relating to the sale and disposition of the public lands, 1 U. S. Stat. at Large, 466, 468; U. S. Rev. Stats, § 2476. See *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawyer, 127.

³ 8 Stats. at Large, 83, 117, 141, 204; Art. 7 of the Treaty of Paris (1763); 1 Halleck's Int. Law, 150.

⁴ *Stuart v. Clark*, 2 Swan (Tenn.), 9, 17; *Gavit v. Chambers*, 3 Ohio, 496; *Hickok v. Hine*, 23 Ohio St. 523, 527; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155, 165; *Lorman v. Benson*, 8 Mich. 18, 26; *Woodman v.*

Kilbourn Manuf. Co., 1 Abb. (U. S.) 158, 165; *The Montello*, 20 Wall. 430, 441; *Schurmeir v. St. Paul Railroad Co.*, 10 Minn. 82, 103; *Castner v. The Dr. Franklin*, 1 Minn. 73; *Morgan v. Reading*, 3 S. & M. 366, 405; *Commissioners v. Withers*, 29 Miss. 21, 38.

⁵ *Ante*, §§ 51-54; *post*, § 75.

⁶ *Ante*, § 53, note.

⁷ See remarks of Martin, J., in *Moore v. Sanborne*, 2 Mich. 519, 525.

⁸ *Post*, § 76; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Schurmeir v. Railroad Co.*, 10 Minn. 82; *McManus v. Carmichael*, 3 Iowa, 1; *Benson v. Morrow*, 61 Mo. 345; *Ross v. Faust*, 54 Ind. 471; *Holmes v. Mallett*, *Morris* (Iowa), 82; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Reed v. Wright*, 2 G. Greene, 15. In *Attorney General v. Lake Superior Canal Co.*, 32 Mich. 233, it was held that the provision in an act of Congress, that a canal should be a public highway free from toll or charge, for United States vessels, sim-

§ 69. The system of surveys and grants of the public lands, adopted by the general government, is also important in this connection.¹ In the case of *Middleton v. Pritchard*,

ply secured a right of free passage, and did not create a trust for the United States in the possession of the State.

¹ By the act of Congress of May 20, 1785, surveyors were directed to divide the territory, ceded by individual States, into townships of six miles square by lines running due north and south, and others crossing these at right angles, "unless where the boundaries of the tracts purchased from the Indians rendered the same impracticable." 1 Land Laws, 19; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 285. This system was preserved in the act of Congress of May 18, 1796, which provided for the sale of the lands of the United States northwest of the Ohio River, the exception being as follows: "Unless where the line of the late Indian purchase, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable; and then this rule shall be departed from no further than such particular circumstances may require." 1 Stats. at Large, 466, § 2; 2 Ibid. 73, 277, 313, 642, 665; 19 Ibid. 348; U. S. Rev. Stats. § 2395. The second section of the act of May 18, 1796, further provides: "Every surveyor shall note in his field-book the true situation of all mines, salt licks, salt springs, and mill seats which shall come to his knowledge; all watercourses over which the line he runs shall pass, and also the quality of the lands. These field-books shall be returned to the Surveyor General, who shall therefrom cause a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships, and fractional parts of

townships, contained in the said lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; a copy thereof shall be kept open at the Surveyors General's office, for public information; and other copies sent to the places of the sale, and to the Secretary of the Treasury." See also U. S. Rev. Stats. § 2395. The third section of this statute provided that salt springs should be reserved, but that "there shall be no reservations, except for salt springs, in fractional townships, where the fraction is less than three-fourths of a township." The act of Congress of May 24, 1824 (4 Stats. at Large, 34 U. S. Rev. Stats. § 2407), empowered the President of the United States to prescribe rules and regulations authorizing a departure from the ordinary mode of surveying the public lands on any river, lake, bayou, or watercourse, so that the lands so situated might be surveyed in tracts of two acres in width and running back the depth of forty acres, which tracts, so surveyed, should be offered for sale entire. As to islands in the Mississippi River, on the side of the Illinois Territory, see § 1 of the act of Feb. 27, 1815 (3 Stats. at Large, 218). The above act of 1796 is the foundation of the surveying system of the United States. The act of Congress of 1803 (2 Stats. at Large, 229) made the provisions of this act applicable to the lands south of the State of Tennessee. The act of 1804 (2 Stats. at Large, 277) extended these provisions to all the lands of the United States, to which the Indian titles had been, or should thereafter be extinguished, north of the River Ohio, and east of the Mississippi River. The act of

the Supreme Court of Illinois held that where a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant; and that as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi River, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river and included the island. It was not denied that it was within the power of the government to exclude the *prima facie* right of the riparian owner to claim to the centre of the stream, but the court considered that it had not indicated such intention in the particular case. The island and slough, they say, "are not marked or mapped upon the plat of the government surveys. But it appears the surveyor of the government traced the courses and distances along the margin of the slough, next the main land, in order to estimate the quantity of land in the fraction; and which estimate did not include the *locus in quo*. But the plats in the land office and the Surveyor General's office have no line marking these courses and distances as a boundary. They are taken from the field-notes of meandering in the Surveyor General's office." It

1805 (2 Stats. at Large, 329) extended them to the Territory of Orleans; and that of 1811 (2 Stats. at Large, 665), to the Territory of Louisiana. The act of 1812 (2 Stats. at Large, 748) extended them to the Missouri Territory, and that of 1816 (3 Stats. at Large, 325) required the surveyor of the Missouri and Illinois Territory to observe these provisions in making his surveys. The act of 1850 (9 Stats. at Large, 496) made the same provisions applicable to the public lands in Oregon and Washington Territories; and that of 1854 (10 Stats. at Large, 308), to those in New Mexico, Kansas, Nebraska, and Utah. The system of survey, by base and meridian lines, thus established under the acts of

Congress, is part of the public law, of which judicial notice is taken by the courts in those States carved out of the public territory. *Murphy v. Hendricks*, 57 Ind. 593; *Bannister v. The Grassy Ford Ditching Association*, 52 Ind. 178; *The Jordan Ditching Association v. Wagoner*, 33 Ind. 50; *Turpin v. The Eagle Creek Co.*, 48 Ind. 45; *Dickenson v. Breeden*, 30 Ill. 279; *Gooding v. Morgan*, 70 Ill. 275; *Prieger v. Exchange Ins. Co.*, 6 Wis. 89; *Atwater v. Schenck*, 9 Wis. 160; *Bittle v. Stuart*, 34 Ark. 224. See, generally, as to the land system of the United States, *Zabriskie's Public Land Laws*; *Lester's Land Laws*; 2 *Am. Law Rev.* 383.

was held that the meandered lines, which are run for the purpose of determining the quantity of land in the fraction, are not boundary lines; and that islands which have not been surveyed, platted, or marked upon the government surveyor's map, pass as incident to a grant of the river banks. Wilson, C. J., dissented upon the ground that the agents of the government, in selling the public lands, could not legally dispose of lands which had not previously been surveyed and platted; and that the rule adopted by the majority of the court was contrary to the policy and practice of the government in which the purchasers had acquiesced. The decision of the majority has since been followed in this State, where the river-beds are the property of the owners of the adjoining lands, where the plats in the United States land office show the river as a boundary, and there is no visible government monument.¹ A grant from the United States of land upon the Mississippi River extends to the thread of the current.² The riparian owner has also, by the law of this State, an exclusive right, as against the public, to the river banks to low-water mark.³ The fee in the streets of cities and towns in this State is vested in the corporation; and, under this rule, where a bridge over a stream forms part of a street, the fee in the portion of the river beneath the bridge is held to be in the corporation, which may devote it, if the navigation is preserved, to such uses as, in the judgment of its authorities, will be most advantageous for the public.⁴

¹ *Middleton v. Pritchard*, 3 Scam. 510; *Canal Trustees v. Haven*, 5 Gilman, 548; *People v. St. Louis*, 5 Gilman, 351; *Ensminger v. The People*, 47 Ill. 384; *Chicago v. Laflin*, 49 Ill. 172; *Chicago v. McGinn*, 51 Ill. 266; *Hubbard v. Bell*, 54 Ill. 110; *Rockwell v. Baldwin*, 53 Ill. 19; *Braxton v. Bressler*, 64 Ill. 488; *Chicago Railroad Co. v. Stein*, 75 Ill. 41; *McCormick v. Huse*, 78 Ill. 363; *Houck v. Yates*, 82 Ill. 179; *Cobb v. Lavalley*, 89 Ill. 331, 334; *Healy v. Joliet Rail-*

road Co., 2 Ill. App. 435; *Bristol v. Carroll Co.*, 95 Ill. 84; *Washington Ice Co. v. Shortall*, 101 Ill. 46.

² *Houck v. Yates*, 82 Ill. 179.

³ *Ensminger v. The People*, 47 Ill. 384; *Chicago v. Laflin*, 49 Ill. 172. The first of these decisions relates to the Ohio River (see *post*, § 71); the second to the Chicago River.

⁴ *Chicago v. McGinn*, 51 Ill. 266; *Canal Trustees v. Havens*, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 50.

§ 70. In Ohio the owners of lands situated upon the banks of its navigable streams own the river-beds, subject to the public right of navigation.¹ In *Gavit v. Chambers*² it was held that the ordinance of 1787³ reserved to the public only the use of such streams for the purpose of passage; that the United States had manifested no intention of reserving any interest in the bed, banks, or waters of navigable fresh rivers; that there was nothing in the trust vested in Congress, or in the manner in which that trust had been executed, to warrant the establishment of any other principle than that afforded by the common law, and that the taking of stones, soil, and fish would lead to innumerable controversies, if this property had been treated by the United States as unappropriated territory. In the recent case of *June v. Purcell*,⁴ it was held that the common-law doctrine, having been regarded for many years as a rule of property in this State, should not be rejected, irrespective of the question of its correctness. In computing the number of acres in a survey of lands upon a river, the stream at low-water mark is regarded in Ohio as the boundary for this purpose, and no account is made of the land between low-water mark and the thread of the stream.⁵

§ 71. In Ohio and Illinois a grant of land bordering upon the Ohio River carries title at least to low-water mark.⁶ The original grant by the State of Virginia only conveyed the territory on the northern bank of the Ohio River to low-water mark. By the compact of 1792 between Virginia and Kentucky a concurrent jurisdiction over this river is accorded to Ohio and Kentucky.⁷ In Indiana, it is held that, as the

¹ *Gavit v. Chambers*, 3 Ohio, 496; *Benner v. Platter*, 6 Ohio, 504; *Lamb v. Rickets*, 11 Ohio, 311; *Blanchard v. Porter*, Id. 138; *Walker v. Board of Public Works*, 16 Ohio, 540; *Hickok v. Hine*, 23 Ohio St. 523; *Niehaus v. Shepherd*, 26 Ohio St. 40; *Sloan v. Biemiller*, 34 Ohio St. 492, 512; *June v. Purcell*, 36 Ohio St. 396. See, also, *McCulloch v. Aten*, 2 Ohio, 307; *Cowper v. Hall*, 5 Id. 320; *Hogg v. Zanes-*

ville Canal Co., 5 Id. 410; *Hopkins v. Kent*, 9 Id. 13.

² 3 Ohio, 496.

³ *Ante*, § 68.

⁴ *June v. Purcell*, 36 Ohio St. 396; *State v. Shannon*, Id. 423.

⁵ *Lamb v. Rickets*, 11 Ohio, 311.

⁶ *Blanchard v. Porter*, 11 Ohio, 138; *Booth v. Hubbard*, 8 Ohio St. 243; *Enslinger v. People*, 47 Ill. 384.

⁷ *Ibid.* p. 142. See remarks of Wood-

State of Virginia, when proprietor of the lands on both sides of the Ohio River, ceded to the United States its right to the territory north-west of this river, whereby the ordinary low-water mark on the northern bank became the boundary of the granted territory,¹ grants by the United States, or its grantees, of lands in Indiana situated on the river, extend the owner's title only to ordinary low-water mark;² and that the southern counties of Indiana are bounded by the same line, although the courts of such counties have concurrent jurisdiction with those of Kentucky over the river.³ The ownership of the beds of navigable streams in Indiana is not clearly settled.⁴

§ 72. In Iowa the opinion of Woodward, J., in *McManus v. Carmichael*,⁵ is among the leading American authorities upon this subject. The question in that case was whether the plaintiff, being the owner of an island in the Mississippi River under a patent from the United States, could maintain an action of trespass against the defendant for taking sand from a sand-bar at the upper end of the island between high and low-water mark and beyond the meanders of the government survey. It was held, upon a full review of the earlier authorities, that, although the ebb and flow of the tide was the common-law test of navigability, yet the term "navigable" embraced not only the idea of capacity for navigation but also that of publicity; that the test of the navigability

ward, J., in *McManus v. Carmichael*, 3 Iowa, 1, 36, 50, 54.

¹ See *Handly v. Anthony*, 5 Wheat. 374; *Conway v. Taylor*, 1 Black, 603; *Commonwealth v. Garner*, 3 Gratt. 624, 655.

² *Stinson v. Butler*, 4 Blackf. 285; *Cowden v. Kerr*, 6 Id. 280; *Gentile v. State*, 29 Ind. 409; *Martin v. Evansville*, 32 Ind. 85; *Sherlock v. Bainbridge*, 32 Ind. 85; 41 Ind. 35, 41; *Bainbridge v. Sherlock*, 29 Ind. 364; *Commissioners v. Pidge*, 5 Ind. 13; *Sherlock v. Alling*, 44 Ind. 184.

³ *Sherlock v. Alling*, 44 Ind. 184;

Carlisle v. State, 32 Ind. 55; *McFall v. Commonwealth*, 2 Met. (Ky.) 394; *Church v. Chambers*, 3 Dana, 279; *Garner's Case*, 3 Gratt. 655.

⁴ See *Ibid.*; *Cox v. State*, 3 Blackf. 193; *Madison v. Hildreth*, 2 Ind. 274; *Sherlock v. Bainbridge*, 41 Ind. 35; *Ross v. Faust*, 54 Ind. 471; *Ridgway v. Ludlow*, 58 Ind. 248; *Edwards v. Ogle*, 76 Ind. 302; *Dawson v. James*, 64 Ind. 162. In the last case the Wabash River is referred to as "a navigable stream, the bed of which has neither been surveyed nor sold."

⁵ 3 Iowa, 1.

of the Mississippi River is ascertained by use or by public acts or declarations; that the repeated declarations that this river is a public highway were to be construed in a broad sense as placing the Mississippi upon the same ground with a river navigable at common law; that by the laws, regulations, and practice of the general land office, the beds of navigable rivers were excepted from the surveys, the rivers were meandered, the lines run, and the monuments set, upon the margin of the bank, the area of the lands was computed and the lands sold with reference to the plats and field-notes of the surveys thus made, and islands were often surveyed and sold separately; and that, as the common law limited the riparian owner's title to the high-water mark in the case of waters technically navigable, all the arguments in favor of an absolutely public water and bed to low-water mark applied equally to the space between high and low-water mark. In conclusion the learned judge said: "By this review it is perceived that force and effect are to be given to various facts, circumstances, and considerations which are scarcely alluded to in some of the cases, and which have no place at all in the older and Eastern cases; such are the treaties, compacts, ordinances, and constitutions, the laws relative to the survey and sale of the public lands, the declaration that these rivers shall forever remain highways, free to all citizens, etc. And we find that the fact of the government selling islands separate from, and independent of, the mainland, had its weight at an early stage of the argument, in Pennsylvania, and even in New York. The fact, also, that the Mississippi River is the boundary between numerous independent States is of great importance, as we have found the cases recognizing the idea that, where a river is the boundary between nations and States, the common-law rule does not apply. All these, and such considerations, formed absolutely no part of the older cases, and enter much less into some of the later ones, than they should.... The conclusion, therefore, is that the plaintiff has not a title to the land between high and low water, so as to enable him to maintain this action for taking the sand. This opinion need not preclude the idea that the adjacent owner may have

some rights between high and low water which are peculiar to himself and not common. Nor does it necessarily determine the question of the right to make wharves or structures for the convenience of navigation and commerce, and other questions of a similar nature. Nor are municipal powers affected, nor does it imply an unbounded license, on the other side, for every one to do what he pleases, even to the detriment of the owner, nor for an unlimited occupation of the shore. The maxim, *sic utere tuo ut alienum non laedas*, still holds; and the powers of an action on the case, of indictment and injunction still remain." In Iowa the meander lines are not lines of boundary,¹ and the title of the riparian proprietors on navigable streams extends only to ordinary high-water mark.² While such proprietors have the right to erect wharves, piers, and landing places beyond that line, if the navigation is not thereby impaired, this is merely an incident to the riparian ownership and not the subject of independent sale.³ The soil of a navigable river below high-water mark is the property of the State, and not of the United States.⁴

§ 73. In Missouri the early case of *Mullanply v. Daggett*⁵ was decided according to the Spanish law, and it was held that the grants from the Spanish government of land upon the Mississippi River conveyed title to the water's edge. In the recent case of *Benson v. Morrow*,⁶ it was held, following

¹ *Kraut v. Crawford*, 18 Iowa, 549; *Musser v. Hershey*, 42 Iowa, 356.

² *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199, 212; *Grant v. Davenport*, 18 Iowa, 179, 185; *Tomlin v. Dubuque Railroad Co.*, 32 Iowa, 106; *Musser v. Hershey*, 42 Iowa, 356; *Houghton v. The C. D. & M. R. Co.*, 47 Iowa, 370; *Barney v. Keokuk*, 94 U. S. 324; *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Moffett v. Brewer*, 2 G. Greene, 348.

³ *Musser v. Hershey*, 42 Iowa, 356.

⁴ *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Martin v.*

Waddell, 16 Peters, 367; *Pollard v. Hagan*, 3 How. 212; *Den v. Jersey City*, 15 Ibid. 426; *Barney v. Keokuk*, 94 U. S. 324; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403.

⁵ 4 Mo. 343.

⁶ 61 Mo. 345. See, also, *Meyers v. St. Louis*, 8 Mo. App. 266; *Primm v. Walker*, 38 Mo. 94, 99; *Smith v. St. Louis*, 21 Mo. 36, 41; *Shelton v. Maupin*, 16 Mo. 124; *Smith v. Public Schools*, 30 Mo. 301; *Le Beau v. Gaven*, 37 Mo. 556; *Jones v. Soulard*, 24 How. (U. S.) 41; *The Schools v. Risley*, 19 Walk. 91; 40 Mo. 365.

the decision of the Supreme Court of the United States in *Railroad Co. v. Schurmeir*,¹ that, the Missouri River, being treated in the acts of Congress as a navigable stream and public highway, the proprietors of lands on its banks, whose titles are derived from the United States, own only to the water's edge; and that islands in the river, which remain unsold, still belong to the United States.

§ 74. In Alabama the common-law rule is rejected.² In *Bullock v. Wilson*,³ the court, referring to the early acts of Congress,⁴ which declared that all navigable rivers within the territory of the United States south of the State of Tennessee "shall be deemed to be and remain public highways," said: "According to the laws and practice of the United States government, relating to the surveys and sale of the public domain, the Coosa, as well as other similar watercourses, is virtually excepted from all private grants. The lines of the survey stop at the margin of the river, by which means, fractions (as in the case before us) are created; and the purchasers of such are only charged for the true quantity of land, the bed of the river being excluded. In respect to grants of lands bounded by watercourses, where there is no statute regulation on the subject, or express exception in the grant, intricate and highly interesting questions may arise as to the extent of the proprietor's right on the margin. In such cases, the character of the water, whether the sea, a navigable river where the tide ebbs and flows, a fresh-water navigable stream, or one not navigable, is material to be considered in determining the extent of the grant." "It is very obvious, however, that with us the question does not depend on the tide, or fresh water; that if the river has been expressly recognized as a public highway by

¹ 7 Wall. 272; *post*, § 77.

² *Bullock v. Wilson*, 2 Porter, 436; *Hagan v. Campbell*, 8 Porter, 9; *Lewen v. Smith*, 7 Porter, 428; *Mobile v. Eslava*, 9 Porter, 577; 16 Peters (U. S.) 234; *Magee v. Hallett*, 22 Ala. 699; *Stein v. Ashby*, 24 Ala. 521; 30

Ala. 363; *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528; *Williams v. Glover*, 66 Ala. 189.

³ 2 Porter, 436, 445, 448.

⁴ 2 Stats. at Large, 235; 3 *Ibid.* 492.

the Federal and State governments; or even if it be of sufficient width and depth, and suited to the ordinary purposes of navigation, and the government has not expressly granted any part of the bed, or computed it in the quantity granted, which implies an exception, as in the case of navigable water, the stream is thereby constituted a public highway, and no individual can assert any private right of soil in the bed beyond the low-water mark. His claim could have no better foundation than that in the case of the oyster-bed planted in the tide water, both places being alike reserved for public use." The character of the smaller fresh streams, which are capable of passage or of floatage at certain seasons, is held to be a question of fact.¹ If they have not been declared public highways by the legislature, or excluded from the surveys by the government surveyors, and are not valuable for public transportation and travel, they are not public highways, but exclusively private property.²

§ 75. In Michigan it was held in the early case of *La Plaisance Bay Harbor Co. v. Monroe*,³ that meandered streams were not included in the original survey, and that the beds of navigable streams are public and belong to the State. But the doctrine of the common law is now the rule in that State,⁴ with respect both to platted city lots⁵ and other lands bordering on rivers and streams. The same rules prevail in Wisconsin.⁶ But the title of the riparian

¹ *Rhodes v. Otis*, 33 Ala. 578.

² *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528.

³ *Walk. Ch.* 155, 168.

⁴ *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Mich. 125; *Moore v. Sanborne*, 2 Mich. 519; *Norris v. Hill*, 1 Mich. 202; *Ryan v. Brown*, 18 Mich. 196; *Clark v. Campau*, 19 Mich. 325; *Watson v. Peters*, 26 Mich. 508; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay Booming Co. v. Speechly*, 31 Mich.

336; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 466.

⁵ *Watson v. Peters*, 26 Mich. 508.

⁶ *Jones v. Pettibone*, 2 Wis. 308; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; 46 Wis. 237; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Walker v. Shepardson*, 4 Wis. 486; 2 Id. 384; *Kimball v. Kenosha*, 4 Wis. 321; *Mariner v. Schulte*, 13 Wis. 692; *Cobb v. Smith*, 16 Wis. 661; *Arnold v. Elmore*, 17 Wis. 509; *Wood v. Hustis*, 17 Wis. 417; *Yates v. Judd*, 18 Wis. 118; *Gove v. White*, 20 Wis. 425; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Arimond v. Green*

proprietor, extending *usque ad filum aquae*, is held in this State to be not only subject to the public right of navigation, but also to the right of the State to regulate the flow of the water and to do any act within the banks which the interests of commerce require.¹

§ 76. According to all the decisions in those States in which the lands were originally surveyed under the laws of the United States, the lines run by the United States surveyors along the river banks are not lines of boundary, the owners of the adjacent lands taking at least to the water's edge,² thus giving them the benefit of the river frontage, with the right of access³ to the river, and the incidents of riparian proprietorship as to the use of the water.⁴ And when such owners once become riparian proprietors, they

Bay Co., 31 Wis. 316; Wright v. Day, 33 Wis. 260; Morse v. Home Ins. Co., 30 Wis. 496; Greene v. Nunnemacher, 36 Wis. 50; Olson v. Merrill, 42 Wis. 203; Delaphine v. Chicago Railway Co., Ibid. 214; Diedrich v. Northwestern Railway Co., Ibid. 248; Boorman v. Sunnachs, Ibid. 233. The Constitution of this State contains the usual provision that the Mississippi and the navigable waters leading into it shall be public highways; and the Statutes provide that where meandered rivers and streams are returned as navigable by a United States surveyor, they shall be deemed navigable. Const. Art. 9; Rev. Stats. (1858) p. 373.

¹ Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; Arimond v. Green Bay Co., 31 Wis. 316; Delaphine v. Chicago Railway Co., 42 Wis. 214; Boorman v. Sunnachs, 42 Wis. 233.

² Railroad Co. v. Schurmeir, 7 Wall. 272; 10 Minn. 82; Middleton v. Pritchard, 3 Scammon, 422; Canal Trustees v. Haven, 5 Gilman, 548; Gavit v. Chambers, 3 Ohio, 495; Wood v. Appal, 63 Penn. St. 210; Kraut v. Crawford, 18 Iowa, 549; Boynton v. Miller, 22 Iowa, 579; Musser v. Hershey, 42 Iowa, 356; Morrow v. Ben-

son, 61 Mo. 345; Meyers v. St. Louis, 8 Mo. App. 266; Minto v. Delaney, 7 Oregon, 337; Moore v. Willamette Transportation Co., Ibid. 355, 356; June v. Purcell, 36 Ohio St. 396, 407; Shoemaker v. Hatch, 13 Nev. 261; Lammers v. Nissen, 4 Neb. 245, 250; St. Paul Railroad Co. v. First Division Railroad Co., 26 Minn. 31; Wright v. Day, 33 Wis. 260; Delaphine v. Chicago Railway Co., 42 Wis. 214; Boorman v. Sunnachs, Ibid. 233; Jones v. Pettibone, 2 Wis. 308; Elder v. Burrus, 6 Humph. 358; McCullough v. Wall, 4 Rich. 68; Ingraham v. Threadgill, 3 Dev. 59; Berry v. Snyder, 3 Bush, 266; Miller v. Hepburn, 8 Bush, 326; Quicksilver Mining Co. v. Hicks, 4 Sawyer, 688; Hills v. Houston, Id. 195; Forsyth v. Smale, 7 Biss. 201; Ross v. Faust, 54 Ind. 471, 475; Two-good v. Hoyt, 42 Mich. 609; Pere Marquette Boom Co. v. Adams, 44 Mich. 403.

³ Post, c. 5; Yates v. Milwaukee, 10 Wall. 497; Dutton v. Strong, 1 Black. 23; Railroad Co. v. Schurmeir, 7 Wall. 272; 10 Minn. 82; Grant v. Davenport, 18 Iowa, 179; Rice v. Rudiman, 10 Mich. 125; Sherlock v. Bainbridge, 41 Ind. 35.

⁴ Post, c. 6.

are entitled to the accretions, or newly-formed ground which may be left by the river after the survey and sale by the United States of the adjacent land, and which, if not their property, would separate them from the river.¹ The tendency is to accept the decisions of the Supreme Court of the United States in *Railroad Co. v. Schurmeir*,² and *Barney v. Keokuk*,³ in those States in which the rule extending the riparian owner's title to the centre of the stream had not been previously adopted. These decisions have been recently followed in Missouri,⁴ Minnesota,⁵ Oregon,⁶ Nevada,⁷ and Kansas.⁸

§ 77. In *Railroad Co. v. Schurmeir*,⁹ the question was as to the title to an island in the Mississippi River, which at the time of the survey was a mere sandbar about ninety feet wide and one hundred and sixty feet long, separated from the mainland by a slough or channel twenty-eight feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the

¹ *Kraut v. Crawford*, 18 Iowa, 549. See *Boynton v. Miller*, 1 Stiles, 100; *Minto v. Delaney*, 7 Oregon, 337; *Moore v. Willamette Transportation Co.*, Ibid. 355; *Lammers v. Nissen*, 4 Neb. 245; *Shoemaker v. Hatch*, 13 Nev. 231; *Banks v. Ogden*, 2 Wall. 57; *Rex v. Yarborough*, 3 B. & C. 91; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; *Bristol v. Carroll County*, 55 Ill. 84; *Chicago Dock Co. v. Kinzie*, 93 Ill. 415; *Middleton v. Pritchard*, 3 Scammon, 510; *Lovington v. County of St. Clair*, 64 Ill. 56; *County of St. Clair v. Lovington*, 23 Wall. 46; *Stephenson v. Goff*, 10 Rob. (La.) 99; *Benson v. Morrow*, 61 Mo. 345; *Lamme v. Buse*, 70 Mo. 463; *Shelton v. Maupin*, 16 Mo. 124.

² 7 Wall. 272.

³ 94 U. S. 324.

⁴ *Benson v. Morrow*, 61 Mo. 345; *Lamme v. Buse*, 70 Mo. 463; *Meyers v. St. Louis*, 8 Mo. App. 266; *ante*, §

73; *Swearingen v. The Lynx*, 13 Mo. 519; *Adams v. St. Louis*, 32 Mo. 25; *Jones v. Soulard*, 24 How. 41.

⁵ *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73, 78; *Schurmeir v. St. Paul Railroad Co.*, 10 Minn. 82, 102; s. c. 7 Wall. 272; *Mankato v. Willard*, 13 Minn. 13, 27; *Brisbine v. St. Paul Railroad Co.*, 23 Minn. 114, 129, 130; *St. Paul Railroad Co. v. First Division Railroad Co.*, 26 Minn. 31.

⁶ *Minto v. Delaney*, 7 Oregon, 337; *Moore v. Willamette Transportation Co.*, Ibid. 355, 356; *Weise v. Smith*, 3 Oregon, 445, 448; *Felger v. Robinson*, Id. 455.

⁷ *Shoemaker v. Hatch*, 13 Nev. 261.

⁸ *Wood v. Fowler*, 26 Kansas, 682. In Texas, see *Rhodes v. Whitehead*, 27 Texas, 304; *Muller v. Landa*, 31 Texas, 265; *Phillips v. Ayres*, 45 Texas, 601. In Arkansas, *Warren v. Chambers*, 25 Ark. 120, 122.

⁹ 7 Wall. 272; 10 Minn. 82.

time of the action, the sandbar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and a railroad company which claimed the bar under a new survey made by a United States surveyor, and a congressional grant of certain odd numbered sections. It was held that the sandbar was included in the first survey as part of the main land. In general, where the waters of a river are separated into two channels by an island or sandbar, the question whether such island or bar was included in the survey as part of the adjoining land, is one of fact, depending chiefly upon the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel.¹ Mere rocks and shoals lying along the margin of navigable fresh rivers belong to riparian owners.²

§ 78. At common law, the owners of lands bordering upon unnavigable streams own to the thread of the stream in severalty and not in common.³ But the acts of Congress,⁴ after declaring that "all navigable rivers, within the territory occupied by the public lands, shall remain and be deemed to be public highways," provide that, "in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both." These provisions were construed in the case of *Railroad Co. v. Schurmeir*,⁵ before the Supreme

¹ *Shoemaker v. Hatch*, 13 Nev. 261; *Lammers v. Nissen*, 4 Neb. 251; *Granger v. Swart*, 1 Woolw. 90; *Benson v. Morrow*, 61 Mo. 345; *Adams v. St. Louis*, 32 Mo. 25; *Moore v. Willamette Transportation Co.*, 7 Oreg. 355; *Minto v. Delancy*, *Ibid.* 337; *St. Paul Railroad Co. v. First Division Railroad Co.*, 26 Minn. 31; *Rock Island County v. Sage*, 88 Ill. 582; *Berry v. Snyder*, 3 Bush, 266, and cases cited; *ante*, § 73.

² *Moore v. Willamette Transporta-*

tion Co., 7 Oreg. 355; *Watson v. Peters*, 26 Mich. 508.

³ See *Moffett v. Brewer*, 1 G. Greene, 348, 358; *Ingraham v. Wilkinson*, 4 Pick. 268.

⁴ 1 Stats. at Large, 468, § 9; 2 *Ibid.* 235, § 17; U. S. Rev. Stats. § 2476.

⁵ *Schurmeir v. Railroad Co.*, 10 Minn. 82; *Railroad Co. v. Schurmeir*, 7 Wall. 272; approved in *The Schools v. Risley*, 10 Wall. 91, 110; *Yates v. Milwaukee*, *Ibid.* 497, 504; *Bates v.*

Court of Minnesota, a decision which was affirmed in the Supreme Court of the United States. It was here held that while there appears to be no law requiring watercourses to be meandered, yet, as the acts of Congress require the contents of each sub-division to be returned to the surveyor general, and a plat of the land surveyed to be made by him, the meander lines are necessarily employed, not as boundaries of the tract, but as a means of defining the sinuosities of the river banks and of ascertaining the quantity of land in the fraction which is subject to sale and is to be paid for by the purchaser; and that the watercourse, and not the meander line, is the boundary. Clifford, J., considered that the better opinion was that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream because of the provision that such rivers shall be deemed to be and remain public highways; that Congress had substantially adopted the common-law rule with respect to unnavigable streams, and that in distinguishing between streams navigable and those not navigable, it intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, and to them only.¹ In a recent case in Indiana²

Illinois Central Railroad Co., 1 Black, 204.

¹ See *Stuart v. Clark*, 2 Swan, 1; *Chicago Railroad Co. v. Stein*, 75 Ill. 41; *Forsyth v. Smale*, 7 Biss. 201.

² *Ross v. Faust*, 54 Ind. 471, 474, 475; *Ridgway v. Ludlow*, 58 Ind. 248. In *Ross v. Faust*, which related to the title to the bed of a meandered unnavigable stream, Perkins, J., said: "We have in the United States three classes of rivers: one, in which the tide ebbs and flows, and may be called salt-water rivers; one, of fresh-water rivers which are navigable for vessels used in inter-state commerce; one, of fresh-water rivers which are not navigable for vessels used in inter-state commerce. The ownership of the bed of the first class of rivers mentioned

is in the public. The ownership of the bed of such of the second class as are in what is known as the North West Territory is in doubt. There is no such concurrence of judicial opinion on the point as enables us to say, upon authority, who owns the bed of these rivers, and it is not necessary that we should decide the point in this case. The ownership of the bed of the third class is, *prima facie*, in the proprietors of the opposite banks, each owning to the thread of the stream. . . . The idea that the power was given a surveyor or his deputy, upon casual observation, to determine the question of the navigability of rivers, and thereby conclude vast public and private rights, is an absurdity." As to the objection that the surveyor had meandered the banks of the stream and had

this view was adopted, although it was noticed that such a construction is in apparent conflict with the language of the statute.¹

§ 79. Fresh-water lakes and ponds are bodies of standing water distinguishable from rivers chiefly by the fact that they have no current.² Frequently, also, they are inaccessible from the sea or from a distance without trespassing upon private lands. The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake, nor does a lake lose its distinctive character because there is a current in it for a certain distance tending towards a river which forms its outlet.³ On the other hand, the fact that a river broadens into a pond-like sheet with a current does not deprive it of its character as a river.⁴ Where it is admitted or not denied that the water is not a lake or a pond, the material difference between which is in size, the only criterion by which to determine whether it is a river, is the existence of a current, and this question cannot be answered by ascertaining what appellations have been given to it.⁵

failed to survey its bed, and that the bed was not bought and paid for, and did not pass to the riparian owners, the learned judge said: "As to the fact, if it be so, that it was not paid for, we may observe that it is a fact of little importance. The Government was not selling her public lands for the purpose of making money. She did not sell them for their value. She was selling them for an almost nominal price, a dollar and a quarter an acre,—enough to cover the cost of survey and sale, possibly a little more. Her object was to induce the settlement in the country of a hardy, land-owning people. Her surveys of the whole were more or less inaccurate."

¹ See *Moffett v. Brewer*, 1 G. Greene, 348, 358.

² *Callis on Sewers*, 82; *Woolrych on Sewers*, 81; *ante*, § 41. *Callis* (p. 82) defines a pool as "a mere

standing water, without any current at all"; but speaks of a pond as if it were always artificial and not natural. Doubtless it may have a broader meaning. In *Waterman v. Johnson*, 13 Pick. 261, 265, Shaw, C. J., said: "The word pond is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary." As to the right to pass or to fish beyond the *filum aquae* of a lake, see *Mackenzie v. Bankes*, 3 App. Cas. 1324, and the authorities there cited; *Scott v. Napier*, 7 Macph. H. L. 35; *Cochrane v. Minto*, 6 Paton, 139.

³ *Per* Gilchrist, J., in *State v. Gilman*, 14 N. H. 467; 9 *Ibid.* 461.

⁴ *Ibid.*; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569.

⁵ *Ibid.* See *Rice v. Ruddiman*, 10 Mich. 125, 135, 136; *Phinney v. Watts*, 8 Gray, 269, 270.

§ 80. The early authorities lay down no definite rule respecting property in inland lakes and ponds otherwise than by limiting the property of the Crown to tide waters.¹ In *Marshall v. Ulleswater Steam Navigation Co.*,² decided in 1863, Wightman, J., remarked that it was not necessary to determine in that case "whether the soil of lakes, like that of fresh-water rivers, *prima facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquae*, or whether it belongs *prima facie* to the king in right of his prerogative"; and the case was decided upon another ground. The case of *Bristow v. Cormican*,³ before the House of Lords in 1878, was an action of trespass for taking fish in Lough Neagh, a fresh-water lake in Ireland, over the whole of which the plaintiff claimed a several fishery under a grant of a fishery and of islands in the lake from King Charles II. The fishery described in this grant did not clearly include the whole lake, and no evidence was introduced as to the title of the Crown to the soil and fishings of the lake. The issue was not whether a lake in which the tides of the sea had never flowed was a public navigable inland sea in which the right of fishing was common, but whether upon the royal grant, coupled with evidence of certain subsequent acts of possession in other parts of the lake, and in the absence of evidence of the extent of the Crown's ownership or possession at the time of the grant, the jury were properly directed to find for the plaintiffs, or whether the case should have been submitted to them on the evidence as to the plaintiffs' title and right to maintain the action. The Lord Chancellor⁴ said: "The Crown has no *de jure* right to the soil or fisheries of a lough like Lough Neagh. Lough Neagh is, as your Lordships are aware, the longest inland lake in the United Kingdom, and one of the largest in

¹ See remarks of Gray, J., in *1 Vent. 122*; Bell's Law of Scotland, *Paine v. Woods*, 108 Mass. 160, 171.

169 (1871), citing *Duke* (ed. 1676) 5, 135; (ed. 1805) 8, 129; *Marshall v. Ulleswater Steam Navigation Co.*,

3 B. & S. 732; *Hunt on Boundaries and Fences* (2d ed.), 19; *Greyes' Case*, Owen, 20; *Pollenfen v. Crispin*,

² 3 Best & Smith, 732, 742, citing *Hale, De Jure Maris*, c. 1; *Com. Dig. Prerogative* (D. 50).

³ 3 App. Cas. 641; s. c. Ir. R. 10 C. L. 398, 412.

⁴ Lord Cairns, pp. 652, 653.

Europe. It is from fourteen to sixteen miles long, and from six to eight miles broad. It contains nearly 100,000 acres; but though it is so large, I am not aware of any rule which would, *prima facie*, connect the soil or fishings with the Crown, or disconnect them from the private ownership either of the riparian proprietors or other persons. Charles II., or some of his predecessors, may have become possessed of the lough and its fishings, either by grant, forfeiture, or otherwise; but it would be a legitimate and necessary subject of inquiry how and from whom, and subject to what conditions or qualifications, this possession or proprietorship was obtained." Lord Hatherley,¹ referring to the difficulties attending the case, because of the lack of information as to the manner in which the Crown acquired title to the property and the extent of that title, said: "It is of very great importance in this case to have all the circumstances of the case before us, and to see how it was that the property became vested in the Crown, of which we have no history at all. Clearly no one has a right to say that it became vested in the Crown because it belonged to nobody else. This is an inland lake, and therefore it is not a portion of land belonging to the Crown by reason of its being on the shore of the sea, or a navigable strait or river." Lord Blackburn said:² "The property in the soil of the sea and of estuaries, and of rivers in which the tide ebbs and flows, is *prima jure* or common right vested in the Crown, but the property of dry land is not of common right in the Crown. It is clearly and uniformly laid down in our books, that where the soil is covered by the water, forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake." Referring to the decision in *Marshall v. Ulleswater Steam Navigation Co.*, the learned judge further said: "This is the only case cited, and, as far as I can find, the only case which

¹ p. 658.

² pp. 665, 667.

exists, where there is even a suggestion that the Crown of common right is entitled to the soil of lakes. Neither the passage in Comyns, nor that in Hale *De Jure Maris*, cited by Mr. Justice Wightman, gives any countenance to such a doctrine. But it does appear that the learned judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water, as to justify him in unnecessarily deciding that it was the same. . . . I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad medium filum aquae* should apply to a lake, is a different question. It does not seem convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough, many miles in length, tacked on to his frontage. But no question arises in this case as to the rights of the riparian proprietors amongst themselves, for no title is made by either party through any one as riparian owner. . . . It is, however, necessary to decide whether the Crown has of common right a *prima facie* title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should have it.”¹

§ 81. In *Bloomfield v. Johnston*,² the Exchequer Chamber in Ireland held that Lough Erne, an Irish fresh-water lake, which is forty-five miles in length, although navigable and commonly used by the public for travel and transportation, was not subject to a common of fishery in the public as of right. It appears, therefore, that by the law of England the Crown and the public have no such rights in large fresh-water lakes as they possess in tide waters; that the soil and fishings in them are private property; and that, while the rule which extends the riparian owners’ title *usque ad filum aquae* does not appear to have been applied to lakes, as to unnavigable

¹ See *ante*, § 19, note.

² Ir. R. 8 C. L. 68.

streams, and is an inconvenient rule for the determination of rights in large lakes,¹ yet the public have no greater privileges in them than in fresh-water rivers. The public right of navigation in them doubtless depends upon prescription and proof of long-continued user.²

§ 82. In this country the question has received greater attention than in England. In the case of *Canal Commissioners v. People*,³ decided in the Court of Errors in New York in 1830, Chancellor Walworth, while holding that the common-law rule was applicable to the navigable fresh rivers of the State, said: "The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes, or inland seas, which are wholly unprovided for by the common law of England. As to these there is neither flow of the tide, or thread of the stream, and our own local law appears to have assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes with the islands therein to the public." The common-law rule as to fresh streams has been held in that State,⁴ and also in Vermont,⁵ to be inapplicable to Lake Champlain. In the case of *Champlain and St. Lawrence Railroad Co. v. Valentine*,⁶ in New York, the boundary line of lands bordering upon the lake was thus defined: "Lake Champlain has no flux and reflux of the tide; but, like most other similar bodies of fresh water in this country, it is high and full in the spring when replenished by rains and melting snows; and, as the season advances, becomes low by the evaporation and efflux

¹ *Bristow v. Cormican*, ante, § 79.

² See *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B. 166; *Bloomfield v. Johnston*, Ir. R. 8 C. L. 68; *Bristow v. Cormican*, 3 App. Cas. 641; Ir. R. 10 C. L. 398, 412; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732; Reg. v. Barrow, 34 Justice of the Peace, 53; *Mackenzie v. Bankes*, 3 App. Cas. 1324.

³ 5 Wend. 423, 446; *Canal Appraisers v. People*, 17 Wend. 571, 597,

616, 621; 3 Kent Com. 429, note (a), 430; *Kingman v. Sparrow*, 12 Barb. 301; *Ledyard v. Ten Eyck*, 36 Barb. 102.

⁴ *Champlain Railroad Co. v. Valentine*, 19 Barb. 484. See *Trustees v. Dennett*, 9 N. Y. Sup. Ct. 669.

⁵ *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316, 323; *Austin v. Rutland Railroad Co.*, 45 Vt. 215.

⁶ 19 Barb. 484, 492.

of its waters. The annual rise and fall, as proved in this case, must be several feet, probably five or six; and the diminution is gradual. A great deal of land, valuable for agricultural purposes, is necessarily overflowed in the spring, which of course can be of no use to the public for the purposes of navigation after the waters recede. The land upon its shores or borders which is inundated in the spring, unlike that which is diurnally (or semi-diurnally) overflowed by the tide, gradually becomes dry, and so remains for the season. Its condition, perhaps, bears some resemblance to that which Lord Hale says is overflowed by high spring-tides, and which, he says, belongs, in England, to the subject and not to the king. It seems to me that, upon principle and sound reason, the proprietors on the borders of Lake Champlain must be deemed the owners to low-water mark, unless otherwise limited by the terms of their grants."¹ Lands in Vermont bounded on Lake Champlain, and upon the streams which empty into that lake, and ordinarily maintain the same level as its waters, also extend to the edge of the water at low-water mark.²

§ 82a. The distinction between public and private lakes depends upon the size and navigability of the particular lake, and its relation to other waters which flow into it or with which it is connected. Lake Winnipiseogee, which is of irregular shape, being about twenty-five miles in length, and varying in width from one to ten miles, and is considerably used for purposes of navigation,³ is held in New Hampshire to be public property, both with respect to its bed and the right of fishing in its waters.⁴ So it has been expressly held in Ohio that the common-law rule as to fresh streams is wholly inapplicable to Lake Erie and the bays which form a part of it, and that the right of fishing in them is as much a

¹ As to boundaries upon lakes and ponds, see *post*, § 203.

² *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316, 323; *Austin v. Rutland Railroad Co.*, 45 Vt. 215.

³ *State v. Franklin Falls Co.*, 49 N. H. 240, 250.

⁴ *State v. Gilmanton*, 9 N. H. 461; s. c. 14 N. H. 467; *State v. Franklin Falls Co.*, 49 N. H. 240, 250.

common right as in tide waters.¹ In *Rice v. Ruddiman*,² the Supreme Court of Michigan passed upon the title to the soil of Lake Muskegon, which was shown to be about six miles long, with an average width of two and one-half miles, and to be separated from Lake Michigan by an outlet about sixty rods long. The fact that the level of Lake Muskegon was affected by the rise and fall of the waters of Lake Michigan was held not to make the former lake necessarily a part of the latter, rather than a mere widening of Muskegon River which flowed into it; and the common-law rule as to fresh streams was held so far applicable to this lake as to entitle the riparian owner to such parts of its bed as were near the shore and capable of beneficial private use, subject, however, to the common right of navigation.³

§ 83. A lake which is not really useful for navigation, although of considerable size compared with ordinary fresh-water streams, may be private property. Thus, in New York, it has been held that an inland lake, five miles long and three-quarters of a mile wide, which has no important inlet, and does not form a part of a chain of connecting waters, is subject to the common-law rule as to fresh-water streams.⁴ In New Jersey, where there are no large inland

¹ *Sloan v. Biemiller*, 34 Ohio St. 492. See, also, *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155, 168; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182, 185; *Verplank v. Hall*, 27 Mich. 79.

² 10 Mich. 125.

³ In *Diedrich v. North-western Railway Co.*, 42 Wis. 248, 271, the court say of this case: "The same ground of the rule in *Rice v. Ruddiman*, 10 Mich. 125, that the riparian owner takes *usque ad medium filum aquae* upon Muskegon Lake, is that the lake is only a widening of the river. With the same view of the lake, we should hold the same view of the law. It is true that some of the opinions speak of extending the same rule of ownership *usque ad medium filum aquae*

to all small lakes within the State; but not so to Lake Michigan. It is also true that some of the opinions speak, and we cannot help thinking somewhat loosely, of some measure of riparian right of use, 'not exclusively or unrestricted,' of the bed of navigable waters under the shallow water by the shore." In Vermont it seems that the creeks and inlets which empty into Lake Champlain, so far as they are of the same level as the lake and ordinarily rise and fall with it, are public like the lake. *Fletcher v. Phelps*, 28 Vt. 257, 262; *Jakeway v. Barrett*, 38 Vt. 316, 323.

⁴ *Ledyard v. Ten Eyck*, 36 Barb. 102. In New York, by statute, the State's title to its navigable waters is a trust for the owners of the upland

lakes extensively used for commerce,¹ it is held that the test by which to determine whether waters are public or private, is the ebb and flow of the tide, and that the decisions in other States, by which the great lakes and navigable rivers were held to be public, otherwise than for purposes of navigation, are alike a departure from the common law.² It has accordingly been held in that State that a fresh-water pond or lake, which was three miles long and one mile wide, and of sufficient depth to float large vessels, but which had no navigable outlet, and had never been navigated by vessels larger than fishing craft thirty feet long, was private property with respect to its soil and fishings.³

§ 84. In Massachusetts the colony ordinance of 1641 provided in substance that great ponds containing more than ten acres of land, and lying in common, though within the bounds of a town, should be free for fishing and fowling; and that for this purpose the public might pass on foot over any man's property, provided they do not trespass on corn or meadow lands.⁴ The ordinance of 1641, as amended by that of 1647, prohibited the towns from granting away great ponds, but affirmed their power to regulate the fisheries both in them and in tide waters, and that of the legislature to dispose of great ponds and of tidal bays, coves, and rivers, or of the common rights of fishing and fowling in them.⁵ This is the foundation of the law of that State upon the subject,⁶

as well as for the public, and the State can only convey the soil under such waters, whether they are lakes or tide waters, to the owner of the adjoining land. *Ibid.*

¹ *Cobb v. Davenport*, 32 N. J. L. 369, 380.

² *Ibid.*

³ *Ibid.* p. 377. In Pennsylvania a pond is not a "private pond" which covers the soil of a person who stocks it with fish, and also the soil of others. It is an entirety, and the whole or none is private. *Reynolds v. Commonwealth*, 93 Penn. St. 458.

⁴ *Commonwealth v. Alger*, 7 Cush. 53, 67, 68; *West Roxbury v. Stod-*

dard, 7 Allen, 158; *Commonwealth v. Vincent*, 108 Mass. 441, 445, 446; *Paine v. Woods*, *Ibid.* 160, 169; *Commonwealth v. Tiffany*, 119 Mass. 300, 303; *Hittinger v. Eames*, 121 Mass. 539; *Tudor v. Cambridge Water Works*, 1 Allen, 164.

⁵ *Commonwealth v. Vincent*, 108 Mass. 441, 446; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27; *Berry v. Rad-din*, 11 Allen, 577; *Tudor v. Cambridge Water Works*, 1 Allen, 164; *Commonwealth v. Weatherhead*, 110 Mass. 177; *Commonwealth v. Tiffany*, 119 Mass. 300.

⁶ *Ibid.*

by which ponds of sufficient size, which were not granted away before the year 1647, are public property like tide waters, both with respect to the soil under them,¹ and the right of reasonable use for all lawful purposes, including fishing, fowling, boating, skating, bathing, the taking of ice for use or for sale, or of the water for domestic or agricultural purposes, or for use in the arts.² The owners of lands bordering upon great ponds have no peculiar right in them, except by grant from the legislature or by prescription,³ and the only restriction upon their enjoyment by all persons is that they shall not interfere with the reasonable use of the ponds by others, or with the public right in cases where the legislature has made no special provision.⁴

§ 85. In the Western States it is held that the owners of lands bordering upon unnavigable lakes situated within the congressional surveys, own the bed of the lake to its centre,⁵ as in the case of unnavigable streams.⁶ In Wisconsin, however, although a riparian owner upon a river or stream takes *prima facie* to its thread, yet the owner of land which borders upon a natural lake, whether navigable or unnavigable, is entitled only to the accretions which are added to his land and to the soil which may be left by the recession of the water, and has no title to the soil which remains submerged.⁷ Such owner takes, however,

¹ *Paine v. Woods*, 108 Mass. 160, 169. The term "great pond," as used in the Massachusetts ordinances and the statute of 1869, c. 384, means a pond of a certain area created by the natural formation of the land at a particular place. *Commonwealth v. Tiffany*, 119 Mass. 300, 303. Under the statute of 1869 the public have no right of fishing in a pond which is not more than twenty acres in extent. *Ibid.*

² *West Roxbury v. Stoddard*, 7 Allen, 158; *Cummings v. Barrett*, 10 Cush. 186, 188; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27; *Hittinger v. Eames*, 121 Mass. 539; *Gage v. Steinkraus*, 131 Mass. 222.

³ *Ibid.*; *Hittinger v. Eames*, 121 Mass. 539, 546.

⁴ *West Roxbury v. Stoddard*, 7 Allen, 158.

⁵ *Ridgway v. Ludlow*, 58 Ind. 248; *Edwards v. Ogle*, 76 Ind. 302; *Forsyth v. Smale*, 7 Biss. 201. In the above case of *Ridgway v. Ludlow*, it was also held that a title, by adverse possession, to land bordering upon an unnavigable lake, gives title to the centre of the lake.

⁶ *Ante*, § 78.

⁷ *Delaphine v. Chicago Railway Co.*, 42 Wis. 214; *Boorman v. Sunnuchs*, 42 Wis. 233; *Diedrich v. Northwestern Railway Co.*, 42 Wis. 248;

to the water's edge, even when the meandered line of the lake differs from the actual water line.¹ In a recent case in Michigan it was said that it had always been customary to permit the public to take fish in the small lakes and ponds of that State, and it was therefore held that the plaintiff in that case who had never given notice forbidding the exercise of this customary right could not maintain an action of trespass against the defendant for passing upon his land with the intention of fishing and for taking fish in a pond which was almost exclusively enclosed by the plaintiff's farm.²

47 Wis. 662; *Olson v. Merrill*, 42 Wis. 203; *Wright v. Day*, 33 Wis. 260; *Shufeldt v. Spaulding*, 37 Wis. 662; *Mariner v. Schulte*, 13 Wis. 692; *Jones v. Phettibone*, 2 Wis. 308.

¹ *Boorman v. Sunnuchs*, 42 Wis. 233; *Delaphine v. Chicago Railway Co.*, *Ibid.* 214; *Diedrich v. North-western Railway Co.*, *Ibid.* 248.

² *Marsh v. Colby*, 39 Mich. 626. Elsewhere it has been held that a

right to take fish in a private river or lake is a *profit à prendre* which could not be acquired by custom unless pleaded with a *que estate*. *Waters v. Lilley*, 4 Pick. 145; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Bland v. Lipscomb*, 24 L. J. Q. B. 155, note; *Gatewood's case*, 6 Co. 60; *Grimstead v. Marlow*, 4 T. R. 718; *Cobb v. Davenport*, 4 Vroom, 223; 3 Id. 369, 389; *Winder v. Blake*, 4 Jones (N. C.), 332.

CHAPTER IV.

THE PUBLIC RIGHT OF NAVIGATION.

SECTION.

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§ 86. The privilege of navigation upon all waters which are capable of such use in their natural condition and are accessible without trespassing upon private lands, is a common and paramount right. It is not confined to the channel or to those parts of the water highway which are most frequently used by vessels, but extends to high-water mark in tidal rivers and tide waters generally;¹ and to the line along the shore of navigable fresh waters at which navigability ceases.² In England, the right of navigation is public in tide water, but depends upon user in the case of navigable fresh waters.³ In this country, tide waters and fresh waters which are navigable in fact are alike open to the public for passage.⁴ The purpose of the navigation is immaterial, and those who pass upon the water for purposes of pleasure, fishing, or fowling have equal rights with those who navigate for business, trade, or agriculture.⁵

¹ *Williams v. Wilcox*, 8 Ad. & El. Porter, 9; ¹*Simpson v. Seavey*, 8 Maine, 314; *Colchester v. Brooke*, 7 Q. B. 138; *State v. Babcock*, 30 N. J. L. 29; 339; *Attorney General v. Terry*, L. Porter v. Allen, 8 Ind. 1.
² *Ibid.*
³ *Ante*, §§ 51, 52.
⁴ *Ante*, §§ 53, 54.
⁵ *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Attorney General v.*

R. 9 Ch. 423; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Commonwealth v. Church*, 1 Penn. St. 105; *Mobile v. Eslava*, 9 Porter, 577; 16 Pet. 234; *Hagan v. Campbell*, 8

§ 87. The riparian proprietors, and those who have private rights in the water or the soil beneath, cannot lawfully obstruct or limit the navigation in any part of the channel without a special power conferred by competent legislative authority. The master of a vessel is not required to shorten sail, or yield the channel to a fishing net, but may lawfully prosecute his voyage, or approach the shore at any point, without regard to seines or nets drawn across the way.¹ If, under the pretence of exercising the right of navigation, he turns out of his course to run upon a net, or lies in wait until it is spread, and then crowds sail to reach it; or, if he unnecessarily anchors on a fishing ground, or loiters about it to prevent its use as such, or does not change his course, when he can do so without prejudice to the reasonable prosecution of his voyage, and has warning that he is approaching the net, he is answerable in damages, because the right of navigation, though superior, does not take away the right of fishery, and cannot be so abused as to excuse wantonness or malice.² In a tidal river the right of navigation is not suspended at low tide when the channel is too shallow to float vessels; and a vessel, which is waiting until the tide serves, is not liable for injury caused without wantonness to an oyster bed upon which the vessel settles.³

§ 88. At common law the right of navigating a public stream is paramount to the right of passage across the stream by means of a bridge.⁴ It is so far superior to a ferry priv-

Woods, 108 Mass. 436, explaining *Rowe v. Granite Bridge*, 21 Pick. 344; *Charlestown v. County Commissioners*, 3 Met. 202, and *Murdock v. Stickney*, 8 Cush. 113; Attorney General *v. Lonsdale*, L. R. 7 Eq. 377; *The Montello*, 20 Wall. 430.

¹ Anon., 1 Camp. 517, note; *Colchester v. Brooke*, 7 Q. B. 339; *Post v. Munn*, 1 South. (N. J.) 61; *Jones v. Keeling*, 1 Jones (N. C.), 299; *Davis v. Jerkins*, 5 Id. 290; *Cobb v. Bennett*, 75 Penn. St. 326; *Moulton v. Libbey*, 37 Maine, 472; *Flanagan v. Phila-*

delphia, 42 Penn. St. 219, 228; *Mason v. Mansfield*, 4 Cranch C. C. 580; *The City of Baltimore*, 5 Ben. 474; *Commonwealth v. Chapin*, 5 Pick. 199.

² *Ibid.*; *Post v. Munn*, 1 South. (N. J.) 61, 62; *Cobb v. Bennett*, 75 Penn. St. 326; *Jones v. Keeling*, 1 Jones (N. C.), 299.

³ *Colchester v. Brooke*, 7 Q. B. 339; 9 Jur. 1090.

⁴ *Castello v. Landwehr*, 28 Wis. 522; *Scott v. Chicago*, 1 Biss. 510. The legislature is the only tribunal that is to reconcile these conflicting interests.

ilege across the stream, exercised by means of a cable, that a steamboat which has not given warning of its approach, is not required to wait for the cable to be lowered, if any damage to the steamer, or chance of damage, could be reasonably apprehended from delay.¹ So the right of a gas company to lay its pipes in the bed of a river is subordinate to the right of navigation; and a vessel which is dragging its anchor as a proper and usual act of navigation under the circumstances in which it is placed, is not responsible, in the absence of negligence or malice, for injury thus caused to the pipes.²

§ 89. The public right of passage must also be exercised with due regard for the rights of riparian proprietors. A vessel in motion is required to use ordinary care not to injure, by its swell, other vessels, rafts, or property attached to the shore, as well as to avoid striking them.³ If a man

Commonwealth v. Breed, 4 Pick. 460; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Middlesex Railroad Co. v. Wakefield*, 103 Mass. 261, 265.

¹ *Steamboat Globe v. Kurtz*, 4 G. Greene (Iowa), 433; *Babcock v. Herbert*, 3 Ala. 392. A wire ferry cable across a navigable river is not an unlawful obstruction to navigation, unless it actually prevents the navigation or renders it hazardous. *The Vancouver*, 2 Sawyer, 381. In *Steamboat Globe v. Kurtz*, 4 G. Greene, 433, 436, Hall, J., said: "The lawful navigation of the river can never be a nuisance to a ferry owner, but a ferry may become a nuisance by obstructing the navigation. While the ferry owner is protected in the enjoyment of his franchise and property pertaining to the ferry, against wanton and wilful injury from those who are engaged in navigating the river, where he has received the usual courtesies that are extended between man and man, he has no cause of complaint. His interest is at best but a servient right, and cannot be extended beyond

the naked object of his license. He is allowed to keep a ferry, not to obstruct the navigation or place a nuisance in the river." A license to keep a ferry upon a navigable stream does not authorize the grantee to place any obstruction across the stream. *Babcock v. Herbert*, *supra*.

² *Milwaukee Gas Light Co. v. The Gamecock*, 23 Wis. 144.

³ *Wright v. Brown*, 4 Ind. 95; *The Rhode Island*, 8 Ben. 50; *The C. H. Northam*, 13 Blatch. 31; 7 Ben. 249; *The Morrisania*, 13 Blatch. 512; *The Daniel Drew*, Id. 523; *Browne v. Stone*, 1 Phila. 241; 5 Penn. Law Jour. 75. A vessel which involuntarily causes injury to another vessel lying alongside, in consequence of the swell caused by a passing steamer, is not liable. *Kissam v. The Albert*, 21 Law Rep. 41. The owners of rafts or vessels moored to the banks are required to take reasonable precautions to prevent injuries liable to be caused by the swell of passing steamers. *Fawcett v. The Natchez*, 3 Woods, 16.

obstinately refuses to remove his ship from opposite a wharf, and it would be as convenient for himself a little one way or the other, this would be an abuse of the common right, and the owner of the wharf may recover for such injury as he thereby sustains.¹ In a recent case in Michigan,² a steamboat was run to and fro in the Detroit River so unnecessarily near a boom which an ice company had constructed near the shore, that the ice within the boom was broken up by the agitation of the water, and the company being unable to procure sufficient ice to fill its houses, the steamboat was held responsible for the loss. The court, in its opinion, after referring to the obligation imposed upon those who use a highway to avoid unnecessary injury to trees, carriages, and other articles that may be within the limits of the way,³ and to the case of the wanton destruction of a fishing-net by a vessel,⁴ said: "The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of private rights or property, where both can be freely and fairly enjoyed. But in this case the vessel did not run into the boom, and therefore it may be said the case is not parallel with those we have been considering. The principle, however, is the same, which recognizes the superior right of the vessel, but punishes any abuse of that right. It is also clearly apparent that vessels have not an exclusive right to use the entire channel, which may be narrowed or used for purposes, some of which are but remotely, if at all, connected with the subject of navigation. It is well known, as this case proves, that there is a class of vessels navigating our lakes and rivers which cause, when running, very great commotion or swells in the water. It is also well known that on many of the rivers a class of lighters and barges are used for the lighterage or necessary transportation of the agricultural, manufacturing, and mining products of the country. This class of vessels are often loaded to the

¹ Anon., 1 Camp. 517, note.

² People's Ice Co. v. Steamer Excelsior, 44 Mich. 229; 22 Alb. Law Jour. 342.

³ Citing Clark v. Dasso, 34 Mich. 86; Cary v. Daniels, 8 Met. 478.

⁴ Citing Post v. Munn, 1 South. (N. J.) 61. See *ante*, § 87.

water's edge, and in smooth waters are thus considered perfectly safe, and yet they could not venture out where the wind or waves could reach them. Would a steamer, approaching such a tow, where it was clearly apparent the swell she created would endanger the lighter or cargo, be justified in recklessly pursuing her course at full speed, in case damage resulted? Upon some of our rivers and water highways artificial banks have been formed for the benefit of commerce, and to prevent a spread of the waters over the adjoining country. The swell caused by steamers of a certain class would, by washing such banks, and otherwise, weaken and injure them, and thus create danger of public and private damage. Such dangers are frequently guarded against by legislation, or rules of the highway; but it may be questionable whether such regulations are not merely declaratory of the common-law maxim that a man must enjoy his own property in such a manner as not to injure that of another person. So the right to boom logs is necessary to their profitable manufacture. The owners must therefore be protected in this right, else it would be of but little value. Vessels would have no right to destroy them, or wantonly run so close to them as to cause a loss of the property therein. A vessel has no right to wantonly run so close to the shore, to a boom, or to a dock, as to cause damage which could easily be avoided by standing farther off." The owner of a vessel is not responsible for injuries caused by inevitable accident,¹ but is liable for the resulting consequences, as well as the immediate consequences, of negligence on the part of those in charge. If a vessel runs aground in consequence of a mistake as to the channel, and another vessel collides with it under the same mistake, the grounding of the first vessel is not the proximate cause of the injury, nor is that vessel bound to signal the approaching vessel as to the course the latter should take, but the owner of the second vessel is

¹ *Ibid.*; *Doward v. Lindsay*, L. R. Bradley, 8 Wend. 469. See *Mark v. 5 P. C. 338*; *The Thornley*, 7 Jur. 659; *Hudson River Bridge Co.*, 56 How. Brown v. Lynn, 31 Penn. St. 510; *The Pr. 108*; *The Oler*, 2 Hughes, 12. Louisiana, 3 Wall. 164; *Dygert v.*

liable for the damage to the first.¹ Where a vessel, being disabled by a collision, and left helpless in the track of navigation, is afterwards injured by a passing vessel, the vessel at fault is liable for the additional injuries thus caused to the disabled vessel.² Where, also, a ship became unmanageable through the negligence of the captain and crew about three-quarters of a mile from a lee-shore, and was then driven by the wind and tide upon a sea-wall, which it damaged, it was held that the negligence was the proximate cause of the injury, and that the owners of the ship were liable therefor.³ In this, and similar cases, the fact that the riparian owner, in the lawful use of his own property, and by his own act, builds out from the shore or river bank, thereby exposing his property to danger of accidental injury from the lawful acts of others, does not deprive him of his remedy for an injury caused by the culpable negligence of such other persons.⁴ But the riparian owner will be liable for any act on his part which causes injury to vessels lawfully navigating the stream. If a vessel or raft, moored without his consent against the front of his land, interferes with his right of access thereto, he may unfasten it and set it adrift, and, if it floats away or is wrecked, he is not liable to the owner for the loss.⁵ But he is not justified in setting adrift anything that will injure vessels navigating the stream. Where the enjoyment of such owner's property was interfered with by a large log, which landed opposite his premises, and he towed it to another part of the river and there left it, he was held liable for the loss of a vessel which struck upon the log and was injured.⁶

¹ *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75.

² *The Oler*, 14 Am. L. Reg. 300; 2 Hughes, 12.

³ *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; L. R. 7 Ex. 247; *The George and Richard*, L. R. 3 Adm. & Ecc. 446; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Bowas v. Tow Line*, 2 Sawyer, 21.

⁴ *Cook v. The Champlain Transportation Co.*, 4 Denio, 91; *Kerwhaker v. The Cleveland Railroad Co.*, 3 Ohio St. 172, 193.

⁵ *Dutton v. Strong*, 1 Black, 23; *Harrington v. Edwards*, 17 Wis. 586.

⁶ *Porter v. Allen*, 8 Ind. 1. In *Satterly v. Hallock*, 5 Hun, 178, the defendant unlawfully removed the plaintiff's vessel from the dock, in which it was lying, to a position where it was injured by settling at low water upon a log which the plaintiff had previously thrown overboard. The plaintiff was held not guilty of contributory negligence.

§ 90. The public right is only limited in this respect by the requirement that it shall be exercised in a reasonable manner; and the fact that the riparian owner sustains damage from this cause does not, in all cases, give him a cause of action. Lands adjoining a river may, without compensation, be legally flowed, to some extent, by persons exercising the right of navigation. Vessels, boats, or logs floating in the water may cause it to rise above its natural level; and, when numerous, they may thus be the source of appreciable damage to the riparian owners. Damage thus caused to the lands of riparian proprietors would be *damnum absque injuria* in the case of rivers navigable for vessels and boats, and a boom company, engaged in driving logs down a stream, is not an insurer that the riparian owners shall not suffer damage.¹ If a log or other property is lodged upon the adjoining

¹ *White River Booming Co. v. Nelson* (Mich.), 7 So. L. Rev. 497, and authorities cited, note 2 below; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 318. In this case, the court said: "In addition to the fact that waters in which ships and other vessels of such burden as would be likely materially to retard the currents, ever become collected or crowded together to such an extent as might, in the shallow and narrow waters, impede the current, are of necessity so much deeper (and generally of much greater width) than rivers like this, whose navigation can be rendered valuable principally for the running of logs, such ships and vessels, by their shape and construction, are so entirely different from saw-logs in respect to the facility afforded for the passage of the current under and around them, that the analogy between the two becomes exceedingly faint, if it does not disappear. But when we consider further, that saw-logs, without any bond of connection, coming down a river, each in its own careless way, and stopped by a boom or other obstruction, collecting into a jam, run over and under each other

in a confused mass, pile upon and across each other in every conceivable direction, and fill the stream from the surface to the bottom, setting back the water like a dam; while ships and vessels, if they do occasionally run others down, have not acquired so general a habit of running over, and across, and under one another, several tiers in depth, as to make the danger of the setting back of a river from this cause, an ordinary or probable incident of navigation. The assumed analogy, therefore, if any can be said to exist, is too faint, shadowy, and uncertain, to serve as the basis of the right here claimed, and would (in the language of Judge Story) betray us into 'an extravagant looseness which would destroy private rights.' The respective rights of the public to use the stream for the purposes of navigation and the floating of logs, and of the riparian owner to the use of his land, must be harmonized, and those running logs down a stream, or collecting, dividing, and storing them, can with no more propriety be allowed, for the sake of rendering the business more safe, convenient, or profitable to them, to raise the water over the

lands by a subsiding freshet, without fault chargeable to any person, the owner may reclaim it, and, doing no unnecessary damage, may go upon the land for that purpose, without being liable for such mishaps or for trespass.¹ So, if a bridge, which was properly constructed and has been kept in repair, is carried away by an extraordinary flood, and is lodged upon the land of a riparian proprietor, the land-owner or the owner of the bridge may remove it, but the former cannot convert it to his own use, and the latter is neither liable for injuries caused by the wreck, nor bound to remove it until he is notified so to do, and even then he may abandon the property.² The property near a water highway is thus held subject to the risks incident to the reasonable exercise of the public right.³

§ 91. In England the right of navigation has always been jealously guarded as a great public interest. In *Rex v. Clark*,⁴ Holt, C. J., said that to hinder the course of a navigable river was against Magna Charta; and, by numerous acts of Parliament,⁵ annoyances to this common privilege were pun-

lands of others, than the latter can be allowed, for their convenience and profit, to erect or maintain, in connection with their lands, dams, or other obstructions to the navigation which the river, in its natural condition, may afford."

¹ *Chase v. Corcoran*, 106 Mass. 286; *Proctor v. Adams*, 113 Mass. 376; *Barker v. Bates*, 13 Pick. 255; *Dunwich v. Sterry*, 1 B. & Ad. 831; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; *Etter v. Edwards*, 4 Watts, 65; 2 Kent Com. 322, 359, 360; 1 Black. Com. 293, 297.

² *Livezey v. Philadelphia*, 64 Penn. St. 106; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 94; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Sheldon v. Sherman*, 42 N. Y. 484; 42 Barb. 368; *post*, § 98.

³ *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; 58 Id. 108; *Brown*

v. Collins, 53 N. H. 442, 449; *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504, 530; *Carter v. Thurston*, 58 N. H. 104.

⁴ 12 Mod. 615. See, also, *Warren v. Prideaux*, 1 Mod. 105; *Magna Charta*, c. 23; *Oldbury v. Stafford*, 1 Sid. 145; *Carter v. Murcot*, 4 Burr. 2162; *Rex v. Smith*, 2 Dougl. 441; *Blundell v. Catterall*, 5 B. & Ald. 91; *Greenwich Board of Works v. Maundslay*, L. R. 5 Q. B. 397; *Barclay Railroad Co. v. Ingham*, 30 Penn. St. 194, 201; *Browne v. Kennedy*, 5 Harr. & J. 195, 203.

⁵ These early statutes are cited and considered in *Hale, De Jure Maris*, c. 3, 5; *Hargrave's Law Tracts*, 9, 22; *Woolrych on Waters*, 155; *Fitz. N. B.* 113; *Callis on Sewers*, 255, 256; *Weld v. Hornby*, 7 East, 195, 198; *Robson v. Robinson*, 3 Dougl. 307; *Williams v. Wilcox*, 8 Ad. & El. 314; *Case of Chester Mill*, 10 Rep.

ished with specific penalties. The intention to preserve the navigation unobstructed in all navigable rivers of England was manifested in the ancient laws relating to sewers,¹ the purpose of which was both to prevent inundations and to assist navigation.² According to Coke and Callis, the king might, even before the making of any statute of sewers, grant commissions for surveying and repairing walls, banks, and rivers, and other defences,³ the decay of which might tend to choke up the navigable channels. The prerogative of the Crown includes, also, the right and duty to protect the realm from the inroads of the sea.⁴ The attorney general may proceed by information, on behalf of the Crown, to prevent a subject from removing a natural barrier against the sea,⁵ and the injuring of such a barrier appears to be an indictable offence at common law.⁶ In England the preservation of harbors, ports, navigable rivers, and docks is now entrusted to corporate bodies of trustees or conservators, and the powers of commissioners of sewers are restricted to such parts of the coast as are not under the regulation of these bodies.⁷

138; 13 Rep. 38; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 229.

¹ See Callis on Sewers, *passim*; Woolrych on Waters, 8, 54-63, 68; Hunt on Boundaries (2d ed.), 33.

² *The King v. Hide*, Styl. 60; *Yeaw v. Holland*, 2 Wm. Bk. 717; *Dore v. Gray*, 2 T. R. 336; Callis on Sewers, 89; 4 Inst. 276; *Rex v. Paghham*, 8 B. & C. 355; *Queen v. Baker*, L. R. 2 Q. B. 621.

³ Case of The Isle of Ely, 10 Rep. 143; Callis on Sewers, 2, 25, 79; Royal Fishery of the Banne, Sir John Davies, 149, 153; *Dore v. Gray*, 2 T. R. 358; *Jean v. Holland*, 2 T. R. 365; 4 Inst. 276; *Queen v. Westham*, 10 Mod. 159. The Commissioners of Sewers could not maintain trespass against one who broke down embankments, but the remedy is by indictment in the name of the king. *New-*

castle v. Clark, 1 Moore, 666; *Driver v. Simpson*, Id. 682.

⁴ *Attorney General v. Tomline*, 12 Ch. D. 214; *Hudson v. Tabor*, 2 Q. B. D. 290; Callis on Sewers, 80; Woolrych on Waters, 42.

⁵ *Attorney General v. Tomline*, 12 Ch. D. 214.

⁶ *Ball v. Herbert*, 3 T. R. 253, 263; *Newcastle v. Clark*, 1 Moore, 666; *Driver v. Simpson*, Id. 682; *Attorney General v. Tomline*, 12 Ch. D. 214, 222; Callis on Sewers, 73, 74.

⁷ Woolrych on Sewers, 49; Greenwich Board of Works v. Maudsley, L. R. 5 Q. B. 397. See authorities, *post*, § 115; Coulson & Forbes on Waters, 26, 80; *Cory v. Bristow*, 2 App. Cas. 262; *Watkins v. Milton*, L. R. 3 Q. B. 350; *Forrest v. Greenwich*, 8 E. & B. 890; *Grant v. Oxford*, L. R. 4 Q. B. 9; *Rex v. London*, 4 T. R. 21.

§ 92. All annoyances and impediments to navigation are *prima facie* public nuisances, whether created by the riparian owners or by strangers.¹ The public may enforce their abatement or removal by indictment, or by an information in equity, and individuals to whom they cause special damage may recover damages at law against those who have created them.² But no indictment will lie for a nuisance in a public river when the injury to navigation is likely to be only slight and of rare occurrence.³ Lord Hale instances⁴ the following nuisances, among others, that may be common to all having occasion to frequent ports: (1) silting or choaking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port, whereby it is choaked. (2) Decays of the wharfs, keys, and piers, which are for the landing of merchandize and safe-guard of shipping. (3) The leaving of anchors in the port without buoys or marks, whereby ships or vessels may strike against them and be spoiled. (4) The building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed. (5) The straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden. (6) "The impediment or hindrance of moreing of ships in the ground adjacent, if it hath been so anciently used, without paying anything for it. Or if it be a new port, yet it seems, the moreing of ships being for the general good of commerce, it must be suffered upon reasonable amends." If unreasonably large masses of oysters be planted or deposited in the bed of a navigable river, they are a nuisance so far as they obstruct the navigation.⁵ So logs or rafts, for mere private convenience, and for no purposes connected with the rights of navigation in a channel which is susceptible

¹ Williams v. Wilcox, 8 Ad. & El. 314; Brucklesbank v. Smith, 2 Burr. 656; Commonwealth v. Caldwell, 1 Dall. 150; Knox v. Chaloner, 42 Maine, 150; Veazie v. Dwinel, 50 Maine, 479, 484; Gerrish v. Brown, 51 Maine, 256; Lancey v. Clifford, 54 Maine, 487; Cox v. State, 3 Blackf. 193.

² Post, §§ 121-128.

³ Rex v. Tindall, 6 Ad. & El. 143.

⁴ Hale, De Portibus Maris, c. 7; Hargrave's Law Tracts, 85. It is a criminal offence in Georgia to throw out ballast in a harbor. Wallace v. State, 46 Ga. 199.

⁵ Colchester v. Brooke, 7 Q. B. 339, 375; State v. Taylor, 27 N. J. L. 117.

of use for navigation, deposited for an unreasonable time, constitute a nuisance in judgment of law.¹ The diversion of water from a river may so impair its navigable capacity as to amount to a public nuisance,² and a city is liable for the detention of navigators caused by diverting the water for purposes subordinate to the right of navigation, as for use in the arts, for driving or lifting power, the washing of pavements, baths, etc., or even for domestic consumption beyond the requirements of necessity.³ The owners of lands bordering upon navigable waters may lawfully throw sewage and other refuse matter into them, provided they do not create a nuisance to others;⁴ for it is a natural office of the sea and of all running waters to carry off and dissipate, by their perpetual motion and currents, the impurities and offscourings of the land;⁵ but the public right of navigation is not limited at common law by any private or municipal right of sewerage.⁶ The filling up by a city, by means of a sewer, of any portion of its harbor, to the injury of the navigation, is an indictable offence;⁷ and if it causes injury to private rights, as by interfering with the access to a wharf or ferry slip, it affords a cause of action to individuals.⁸ The owners of mills and manufactories are bound to see that filth, trash, and other waste cast from their works into a navigable stream do not obstruct the navigation,⁹ and their negligence in this

¹ *Commonwealth v. Fleming*, Lewis's Crim. Law, 533, 534; *Commonwealth v. Strickler*, Id. 535; *Moore v. Jackson*, 2 Abb. (N. C.) 211; *Hayward v. Knapp*, 23 Minn. 431.

² *Stokes v. Upper Appomattax Co.*, 3 Leigh, 318; *Medway Navigation Co. v. Romney*, 9 C. B. n. s. 575.

³ *Philadelphia v. Gilmartin*, 71 Penn. St. 140; *Philadelphia v. Collins*, 68 Penn. St. 106; *Commonwealth v. Tewksbury*, 11 Met. 55, 57; *Yolo Co. v. Sacramento*, 36 Cal. 193.

⁴ *Haskell v. New Bedford*, 108 Mass. 208, 214.

⁵ *Gray, J.*, in *Haskell v. New Bedford*, 108 Mass. 208, 214.

⁶ *Brayton v. Fall River*, 113 Mass.

218; *Franklin Wharf v. Portland*, 67 Maine, 46, 55; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Washburn & Moen Manuf. Co. v. Worcester*, 116 Mass. 458.

⁷ *Ibid.*; *Clark v. Peckham*, 10 R. I. 35; 9 R. I. 455. But in such case, the obstruction must be against the front of the plaintiff's land. *Post*, § 97. And a municipal corporation may connect its sewers with a natural water-channel, without liability to keep the channel open to its mouth. *Munn v. Pittsburgh*, 40 Penn. St. 364.

⁸ *Ibid.*; *Sleight v. Kingston*, 11 Hun, 594.

⁹ *Ibid.*; *Veazie v. Dwinel*, 50 Maine, 479; *Dwinel v. Veazie*, 50 Maine, 479;

respect gives rise to private rights of action.¹ If a telegraph company, which is authorized by statute to lay its cable in navigable waters in such manner as not to "injuriously interrupt the navigation," causes the cable to be so laid or suspended that it comes in contact with vessels which would otherwise pass without difficulty or interruption, the cable is a nuisance, and the company is liable for any damage thereby caused to a vessel which is not at fault.² The facts that other vessels and the vessel injured have passed the obstruction safely, and that a projecting iron on the vessel caused it to catch upon the cable, do not necessarily relieve the company of liability, since, as against a wrong-doer, the owners of a vessel are not bound to keep it in the best possible repair.³ The fact that an obstruction is a nuisance does not justify the master of the vessel in destroying or running upon it negligently, for one member of the public is not justified in causelessly injuring another's property by the fact that such property is so placed as to interfere with a public right.⁴ If the navigator casts his vessel upon the obstruction unnecessarily, he is guilty of contributory negligence, and cannot recover for the injury he may thereby sustain.⁵ A vessel which comes to anchor negligently, or is otherwise guilty of negligent navigation, is liable for injuring a telegraph cable, laid at the bottom of the sea, with which its anchor comes in contact.⁶ The relative rights and duties of persons navi-

44 Maine, 167; *Gerrish v. Brown*, 51 Maine, 256; *Davis v. Winslow*, 51 Maine, 264; *State v. Bunker*, 59 Maine, 366; *Washburn v. Gilman*, 64 Maine, 163; *Barrett v. Bangor*, 70 Maine, 335, 338; *Brackelsbank v. Smith*, 2 Burr. 656; *Simpson v. Seavey*, 8 Maine, 138.

¹ *Haskins v. Haskins*, 9 Gray, 390; *Washburn v. Gilman*, 64 Maine, 163.

² *Blanchard v. Western Union Telegraph Co.*, 60 N. Y. 510; 67 Barb. 228; 3 Supr. Ct. 775; *Stephens Transportation Co. v. Western Union Telegraph Co.*, 8 Ben. 502. ³ *Ibid.*

⁴ *Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 Q. B. 276; *Bate-*

man v. Bluck, 18 Q. B. 870; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *Butterfield v. Forrester*, 11 East, 60; *State v. Antoine*, 40 Maine, 435; *Cummins v. Presley*, 4 Harr. (Del.) 315; *Foster v. Holly*, 38 Ala. 76; *Steamboat v. McCraw*, 26 Ala. 189, 203; *Inman v. Funk*, 7 B. Mon. 538; *Pilcher v. Hart*, 1 Humph. 524; *Castello v. Landwehr*, 28 Wis. 522.

⁵ *Ibid.*; *Lane v. The A. Denike*, 3 Cliff. 117; *Knowlton v. Sanford*, 32 Maine, 148.

⁶ *Submarine Telegraph Co. v. Dickson*, 15 C. B. n. s. 759; *The Clara Killam*, L. R. 3 Adm. & Ecc. 161.

gating vessels apply equally whether in ports or rivers, or within the three-mile belt along the coast, or on the high seas generally.¹

§ 93. The distinction between a purpresture and a public nuisance was stated in a previous chapter.² Any unauthorized invasion of the soil of the seashore between high and low-water mark, or of the shore or *alveus* of a tidal river, or of the bed of an estuary or arm of the sea, while these remain the property of the Crown, or, in this country, of the State, is a purpresture.³ In strictness, the question whether a wharf or building erected in tide waters is a purpresture depends upon the ownership of the soil which it covers.⁴ At common law, if the person who makes such a structure establishes his right to the soil by producing a grant or license from the Crown, it is not a purpresture, although it may still be unlawful if it obstructs the navigation. In the latter case, the structure is abateable as a nuisance notwithstanding the king's license, for a common nuisance is not warrantable by the Crown.⁵ The law upon this subject is thus stated by Lord Hale:⁶ It is not "every building below the high-water mark, nor every building below the low-water mark, is *ipso facto* in law a nuisance. For that would destroy all the keys that are in all the ports in England. For they are all built below the high-water mark; for otherwise vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straightens the port, for the king cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is

¹ See *Ibid.*, per Willes, J., p. 779.

² *Ante*, § 21.

³ *Ante*, § 21; *Blundell v. Catterall*, 5 B. & Ad. 268.

⁴ *Ibid.*

⁵ Hale, *De Portibus Maris*, c. 7; Hargrave's Law Tracts, 85; Mississippi

Railroad Co. v. Ward, 2 Black, 485; *Nichols v. Boston*, 98 Mass. 39, 41.

⁶ Hale, *De Portibus Maris*, c. 7; Hargrave's Law Tracts, 85; *De Jure Maris*, c. 3, 5, 6; Hargrave's Law Tracts, 9, 21, 22, 23, 36.

impossible for vessels to ride. Indeed, where the soil is the king's, the building below the high-water mark is a purpresture, an encroachment and intrusion upon the king's soil, which he may either demolish or seize, or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless, indeed, it be a damage to the port and navigation." Whether a wharf or building extended into tide waters is a nuisance is purely a question of fact.¹

§ 93 *a*. The above rules apply also to navigable fresh rivers in those localities where they are held to be public property like the sea. But when the title of the riparian proprietors extends *usque ad flum aquae*, such proprietors are at liberty, as against the public, to erect any structure, or to do any act with respect to the water, or the portion of the river-bed owned by each, provided they do not interfere with the navigation,² and the public have no other right than that of free and unmolested passage.³ This right of passage does not include the right to take rocks, gravel, or soil from the bed of non-tidal rivers which are private property, and the owner of the adjoining land may maintain an action of trespass for this cause,⁴ or replevy from the wrongdoer the rocks or soil so taken.⁵ Stone cannot be quarried, without compensation, from the bed of a private stream, for the purpose of constructing a public bridge, even at that part of the bed which is beneath the proposed bridge.⁶ In Pennsylvania,

¹ *Ibid.*; *ante*, § 21; *Queen v. Betts*, 16 Q. B. 1022; *Abraham v. Great Northern Railway Co.*, 16 Q. B. 586, 591; *Dutton v. Strong*, 1 Black, 23, 31; *Columbus Bridge Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Nichols v. Boston*, 98 Mass. 39, 41; *Burnham v. Hotchkiss*, 14 Conn. 318; *Thornton v. Grant*, 10 R. I. 477; *The Erie v. Canfield*, 27 Mich. 479; *Clark v. Lake St. Clair Ice Co.*, 24 Mich. 508; *Attorney General v. Evart Booming Co.*, 34 Mich. 462; *People v. Carpenter*, 1 Mich. 273; *Howard v. Robbins*, 1 Lans. 63; *Knox v. New York*, 55 Barb. 404; 38 How. Pr. 67; *Van Der Brooks*

v. Currier, 2 Mich. N. P. 21; *Delaware Canal Co. v. Lawrence*, 2 Hun, 163; 56 N. Y. 612.

² *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, 845, 853, 854, 870; *Walker v. Board of Works*, 16 Ohio, 544; *Attorney General v. Evart Booming Co.*, 34 Mich. 462.

³ *Ibid.*

⁴ *Braxton v. Bressler*, 64 Ill. 488; *June v. Purcell*, 36 Ohio St. 396; *Ross v. Faust*, 54 Ind. 471; *Berry v. Snyder*, 3 Bush, 266, 285.

⁵ *Braxton v. Bressler*, 64 Ill. 488.

⁶ *Overman v. May*, 35 Iowa, 89.

where the large fresh-water rivers belong to the public, paving stones taken from such rivers belong to the taker.¹

§ 94. In *Rex v. Russell*² the defendants were indicted for wrongfully continuing two coal staiths or geers in a navigable river to the public nuisance of the navigation. The geers extended over the space between high and low-water mark, and one or two feet below low-water mark, with spouts projecting therefrom, one of which extended outward thirty-six feet. The opinion of the majority of the court³ was that the defendants should be acquitted if the abridgment of the navigation caused by these structures was for a public purpose, and produced a public benefit, by enabling coals to be supplied at a cheaper price and in better condition than before, provided that a reasonable space was left for the passage of vessels upon the river. In subsequent English cases⁴ it was held that, upon an indictment for a public nuisance, the violation of rights which belong to any part of the public cannot be excused or vindicated by offsetting the benefit which may arise to another part of the public elsewhere. In the case of *Rex v. Ward*,⁵ in which the decision of *Rex v. Russell* was reviewed, it was held that a finding by the jury, that an embankment in a water highway is a nuisance, as interfering with the navigation, but that the inconvenience is counterbalanced by the public benefit arising therefrom, amounted to a verdict of guilty. The rule now is that the inquiry for the jury is whether the structure is a nuisance to the navigation, and not whether it is beneficial to the public; and that counterbalancing benefits which may accrue to the public from that which is found to be a nuisance are immaterial.⁶

¹ *Solliday v. Johnson*, 38 Penn. St. 380.

² 6 B. & C. 566; 9 D. & R. 561. See, also, *Rex v. Grosvenor*, 2 Starkie, 511, 514.

³ *Bayley and Holroyd, JJ.*, Lord Tenterden, C. J., dissenting.

⁴ *Rex v. Ward*, 4 Ad. & El. 384; *Rex v. Morris*, 1 B. & Ad. 441; Reg.

v. Betts, 16 Q. B. 1022, 1037; Reg. *v. Randall*, 1 Car. & M. 496; Reg. *v. Charlesworth*, 16 Q. B. 1012.

⁵ *Rex v. Ward*, 4 Ad. & El. 384.

⁶ *Ibid.*; *Rex v. Tindall*, 6 Ad. & El. 143; 3 El. & Bl. 942; *Rex v. Morris*, 1 B. & Ad. 441; *Folkes v. Chad*, 3 Dougl. 340; Reg. *v. Betts*, 16 Q. B. 1022, 1037; Reg. *v. Randall*, 1 Car. & M.

§ 95. The right of navigation includes the right to anchor as incidental to its beneficial enjoyment; and a claim by individuals or corporations, founded on royal grant or immemorial usage, for a toll or anchorage on all vessels which anchor in an arm of the sea which is not a port, cannot be maintained.¹ As against other vessels, but not against the riparian owners,² it includes the right to moor to wharves and to the shore, and thereby to occupy exclusively, for a reasonable time and in a proper manner, the portion of the channel covered by the vessel.³ Ships may land and remain at the shore during such periods, and at such places as may be reasonably necessary for loading and unloading and awaiting cargoes.⁴ So logs and rafts, floated down a stream, may be moored for a reasonable time to the shore for the purpose of making up the logs into rafts, or for breaking up the rafts, or to enable the owners to sell them.⁵ The reasonableness of the time, place, and manner of the mooring under the foregoing rules is a question of fact for the jury,⁶ and the privilege of stopping upon the water is practically the same

496; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Commonwealth v. Wright*, 3 Am. Jur. 185; *People v. Vanderbilt*, 26 N. Y. 287, 297; *Hart v. Albany*, 9 Wend. 571, 582; *People v. Horton*, 64 N. Y. 610, 620; *Respublica v. Caldwell*, 1 Dallas, 150; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 577; *State v. Kaster*, 35 Iowa, 221; *Garitee v. Baltimore*, 53 Md. 422, 436; *Blanchard v. Moulton*, 63 Maine, 434; *People v. St. Louis*, 5 Gilman, 351, 372; *Works v. Junction Railroad*, 5 McLean, 425; *Thornton v. Grant*, 10 R. I. 477, 482. But see *Mississippi Railroad Co. v. Ward*, 2 Black, 485, 494; *Pilcher v. Hart*, 1 Humph. 524, modified in *Gold v. Carter*, 9 Humph. 369; *Commonwealth v. Bilderback*, 2 Parsons (Pa.), 447; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516; *Delaware Canal Co. v. Lawrence*, 2 Hun, 163; 56 N. Y. 612; *Commonwealth v. May*, 3 Am. Jur. 190; *Commonwealth v. Crowninshield*, 2 Dane's Abr. 697.

¹ *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266.

² *Post*, § 98.

³ *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Wyatt v. Thompson*, 1 Esp. 252; *Hayward v. Knapp*, 23 Minn. 430; *Sherlock v. Bainbridge*, 41 Ind. 35; *Bainbridge v. Sherlock*, 29 Ind. 364; *Baker v. Lewis*, 33 Penn. St. 301; *Browne v. Stone*, 1 Phila. 241; 5 Clark, 75; *Gerrish v. Brown*, 51 Maine, 256, 263; *Culbertson v. The Southern Belle*, 1 Newb. 461; *The Granite State*, 3 Wall. 310; *Culbertson v. Shaw*, 18 How. 584.

⁴ *Ibid*.

⁵ *Hayward v. Knapp*, 23 Minn. 430; *Davis v. Winslow*, 51 Maine, 264; *Weise v. Smith*, 3 Oreg. 445; *Brown v. Kentfield*, 50 Cal. 129; *Dalrymple v. Mead*, 1 Grant Cas. 197.

⁶ *Ibid*; *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713, 722.

as in the case of a carriage upon a road.¹ The owner of floating logs who wishes to direct them into his mill-pond, may use, for that purpose, temporary guide booms which do not unreasonably obstruct the channel;² and, if a booming company encloses part of a floatable stream in a reasonable and prudent manner for its own purposes, the fact that another booming company upon the same stream is thereby inconvenienced, does not make the boom of the first company a public nuisance.³

§ 96. All persons have an equal right to the reasonable use of public streams for travel and transportation; and a navigator who, in the proper exercise of this right, temporarily obstructs another, does not become guilty of a nuisance or trespass.⁴ The occasional grounding of a vessel or raft is incidental to navigation,⁵ and if it is driven into a position where it obstructs the channel, other navigators are bound to submit to a reasonable delay in order that the owner may remove it, before attempting to destroy it as a nuisance.⁶ The fact that a portion of a vessel in landing at a wharf overlaps in front of an adjoining wharf or dock, thereby rendering access to the latter temporarily inconvenient, does not create any liability if other vessels do not at the time desire to approach the adjoining premises; and, even if they do, the same rule undoubtedly applies if the first vessel exercises proper skill and despatch, and causes as little inconvenience as possible to others.⁷ Vessels have also the

¹ Original *Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Sherlock v. Bainbridge*, 41 Ind. 35; *Rex v. Cross*, 3 Camp. 224; *Cary v. Daniels*, 8 Met. 478; *State v. Thompson*, 2 Strob. (S. C.) 12; *Sawyer v. Eastern Steamboat Co.*, 46 Maine, 400; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516; *State v. Holman*, 29 Ark. 58.

² *Ibid.*; *Veazie v. Dwinel*, 50 Maine, 493.

³ *Attorney General v. Evart Booming Co.*, 34 Mich. 462.

⁴ *Davis v. Winslow*, 51 Maine, 264; *Lancey v. Clifford*, 54 Maine, 489;

Gerrish v. Brown, 51 Maine, 263; *Canfield v. Erie*, 27 Mich. 479; 1 Mich. N. P. 105; *Attorney General v. Evart Booming Co.*, 34 Mich. 462.

⁵ *Colchester v. Brooke*, 7 Q. B. 339; *The Ellen S. Terry*, 7 Ben. 401; *The Coleman*, 1 Brown Adm. 456; *The Thomas A. Scott*, Id. 503; *Cummins v. Spruance*, 4 Harr. (Del.) 315.

⁶ *Lallande v. The C. D. Jr.*, Newb. Adm. 501.

⁷ Original *Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Sherlock v. Bainbridge*, 41 Ind. 35; *Bainbridge v. Sherlock*, 29 Ind. 364; *Delaware River Steam-*

right to use a warp in getting in or out of harbor, if they do not interfere with navigation.¹ They may extend the warp across the entire channel if no other vessels are passing; but must take notice of the approach of another vessel, and slacken the warp so as to allow sufficient space for the approaching vessel to pass, and give timely notice of the space so left.² If this notice is disregarded, and injury results, the burden of proof will be upon the latter vessel.³ Where a collision occurs between a vessel which is stationary or in stays,⁴ and another which is in motion, the presumption of negligence is against the latter.⁵ This rule of admiralty, which is also applied by the common-law courts,⁶ is a presumption of fact which may be rebutted. Want of a proper watch, or neglect to show proper lights or signals at night, especially when lying in a navigable channel, would be sufficient to overcome it,⁷ if the neglect of such precaution contributed

boat Co. v. Burlington Ferry Co., 81 Penn. St. 103.

¹ Potter v. Pettis, 2 R. I. 483, 487; McCord v. The Tiber, 6 Biss. 409; Annett v. Foster, 1 Daly, 502; The Maverick, 1 Sprague, 23; 5 Law Rep. 106; The Hope, 2 W. Rob. 8.

² Ibid.

³ Ibid.

⁴ The Charlotte Roab, 1 Brown Adm. 453.

⁵ The Victoria, 3 W. Rob. 52; The Egyptian, 1 Moo. P. C. n. s. 373; The Otter, L. R. 4 Adm. 203; Cuthbertson v. Shaw, 18 How. 584; Ure v. Coffman, 19 How. 56; The Bridgeport, 41 Wall. 116; The Granite State, 3 Wall. 310; The Louisiana, 3 Wall. 164; The Bridgeport, 14 Wall. 116; The Clarita, 23 Wall. 1, 14; Bill v. Smith, 39 Conn. 206; Baker v. Lewis, 33 Penn. St. 301; Austin v. New Jersey Steamboat Co., 43 N. Y. 75; Foster v. Holly, 38 Ala. 76; The Fremont, 3 Sawyer, 571; Steamboat United States v. St. Louis, 5 Mo. 230; Buzzard v. The Petrel, 6 McLean, 491; The Indiana, Abb. Adm. 330; Sterling v. The Jennie Cushman, 2 Cliff. 636;

The Lady Franklin, 2 Lowell, 220; The J. W. Everman, 2 Hugh. 17; Hall v. Little, 18 Alb. L. Journal, 151; 6 Rep. 577; The A. R. Whetmore, 5 Ben. 147; The Pennsylvania, 4 Ben. 257; Mercer v. The Florida, 3 Hugh. 488; The Midas, 6 Ben. 173; The Duchess, Id. 48; The Planet, 1 Brown Adm. 124; The Masten, Id. 436; Jerome v. Floating Dock, Id. 508; The Milwaukee, 2 Biss. 509; Amoskeag Manuf. Co. v. The John Adams, 1 Cliff. 404; The Bridgeport, 7 Blatch. 361; 1 Ben. 65; The Helen R. Cooper, Id. 378; The E. C. Scranton, 2 Ben. 25; The Baltic, Id. 452; The Nebraska, Id. 500; The Patterson, 3 Ben. 299; The Avid, Id. 434; The Leo, Id. 569. When a ship is about to be launched, and the navigation will thereby be obstructed temporarily, reasonable notice must be given to avoid collisions. The Vianna, Swa. Adm. 405.

⁶ Bill v. Smith, 39 Conn. 206.

⁷ Sproul v. Hemingway, 14 Pick. 1; Carsley v. White, 21 Pick. 254; The Julia, 2 Lush. 231; The John Fenwick, L. R. 3 Ad. & Ec. 500; The Clara, 102 U. S. 200; Arctic Fire Ins.

to the injury.¹ A vessel lying at anchor in a gale, which has the power to avoid a threatened collision, is bound to do so.² So, the anchoring of a vessel at an unsafe and improper place is a negligent act,³ and if the improper anchorage is the proximate cause of a collision with a vessel in motion, no action, according to the principles of the common law, lies against the latter vessel to recover compensation,⁴ although in admiralty the loss would be divided if both vessels were at fault.⁵ A vessel which breaks from her moorings, and strikes a seawall or another vessel, is required to show affirmatively that the drifting was caused by inevitable accident and not by lack of proper precaution.⁶

Co. v. Austin, 69 N. Y. 470; *Whitehall Transportation Co. v. New Jersey Steamboat Co.*, 51 N. Y. 369; *Nelson v. Leland*, 22 How. 48; *Silliman v. Lewis*, 49 N. Y. 379; *The Victoria*, 3 W. Rob. 52; *The City of Baltimore*, 5 Ben. 474; *The Express*, 1 Blatch. 355; *Bill v. Smith*, 39 Conn. 206; *The City of London*, Swa. Adm. 245; *Browne v. Stone*, 1 Phila. 241; 5 Clark, 75; *Baltimore Railroad Co. v. Wheeling Transportation Co.*, 32 Ohio St. 116; *Billings v. Breinig*, 45 Mich. 65; *The Scioto*, Davies, 359; *The Saxonia*, Lush. Adm. 419; *The Industrie*, L. R. 3 Adm. & Ec. 308; *Rathbun v. Payne*, 19 Wend. 399; *Kennard v. Barton*, 25 Maine, 39, 47; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 115; *The Clara*, 13 Blatch. 509; *The Indiana*, Abb. Adm. 330; *The Lyon*, Sprague, 40; *Lenox v. Winissimmet Co.*, Ibid. 160; *Cuthbertson v. Shaw*, 18 How. 584; *Ure v. Coffman*, 19 How. 56; *Sparks v. Saladin*, 6 La. Ann. 764; *Beyer v. The Nurnberg*, 3 Hugh. 505.

¹ *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *Mellon v. Smith*, 2 E. D. Smith, 462; *The Farragut*, 10 Wall. 334; *The Masters*, 1 Brown Adm. 342; *Meigs v. Steamship Northerner*, 1 Wash. Ter. 91.

² *The Sapphire*, 11 Wall. 164.

³ *Strout v. Foster*, 1 How. 89; 17

Pet. 107; *The Electra*, 6 Ben. 189; *The Indiana*, Abb. Adm. 330; *Knowlton v. Sanford*, 32 Maine, 148.

⁴ *Vennall v. Garner*, 1 Comp. & M. 21; *Luxford v. Large*, 5 Car. & P. 421; *Dowell v. General Steam Navigation Co.*, 5 El. & Bk. 195; *Vanderplank v. Miller*, Mood. & M. 169; *The Marcia Tribon*, 2 Sprague, 17; *The Scioto*, 2 Ware, 366; *Strout v. Foster*, 1 How. (U. S.) 89; *Atlee v. Packet Co.*, 21 Wall. 389; *Lambert v. Staten Island Railroad Co.*, 70 N. Y. 104; *Arctic Fire Ins. Co. v. Austin*, 9 N. Y. 470; 3 Hun, 195; *The Clarita*, 23 Wall. 1, 14; *Halderman v. Beckwith*, 4 McLean, 296; *Broadwell v. Swigert*, 7 B. Mon. 39; *Steamboat v. McCraw*, 26 Ala. 189, 203; *Adams v. Wiggins Ferry Co.*, 27 Mo. 95.

⁵ *Catharine v. Dickinson*, 17 How. 170; *Atlee v. Packet Co.*, 21 Wall. 389; *The Morning Light*, 2 Wall. 550; *Union Steamship Co. v. New York Steamship Co.*, 24 How. 307; *The Clara*, 102 U. S. 200; *The Rival*, Sprague, 128; *The Marcia Tribon*, 2 Sprague, 17; *O'Neil v. Sears*, Id. 52; *The Comet*, 1 Abb. (U. S.) 451; *The Nautilus*, Ware, 529; *Vanderplank v. Miller*, Mood. & M. 169; *Simpson v. Hand*, 6 Whart. 311; *The Atlas*, 93 U. S. 302.

⁶ *The Louisiana*, 3 Wall. 164; *The Titan*, 8 Ben. 7; *The Christopher Co-*

§ 97. The right of moorage cannot be lawfully exercised in such a manner as to create a permanent obstruction to the navigation, even if the obstruction would be in the aid of commerce. A boom which obstructs the use of a river for navigation or floating lumber, or raft of timber moored continually to its shores, is a public nuisance, as limiting the right of navigation;¹ and, also, a private nuisance, if it causes peculiar injury to a navigator, or deprives the riparian owners of access to their premises.² Keeping a raft moored for six weeks in one place has been held to be an unreasonable obstruction to the right of passage.³ The proprietors of a dock privilege constructed in front of their lots, upon the Hudson River at Albany, a floating storehouse or vessel with a roof and convenient openings for receiving and discharging merchandise. This permanent occupation of a portion of the river was held to be an obstruction to its free and common use, the same as if it were erected in the open channel.⁴ The same has been held with respect to a disused canal-boat, which, being nearly sunken, was fastened to the shore and rendered the navigation less safe and convenient.⁵

§ 98. The duty of a person, using a navigable river as a highway, to exercise reasonable care and skill to prevent injury to other vessels, continues so long as he retains the management and control of the vessel. If he remains in possession, his liability is the same whether the vessel is in motion or stationary, floating or aground, under water or

Iumbus, *Ibid.* 239; *The Petunia*, *Ibid.* 349; *The Queen of the East*, 4 Ben 103; *The Johannes*, 10 Blatch. 478; *The Fremont*, 3 Sawyer, 571; *The Buckhurst*, 30 W. R. 232; *Love v. Montgomery*, 10 La. Ann. 113.

¹ *Moore v. Jackson*, 2 Abb. (N. C.) 211; *Lowber v. Wells*, 13 How. Pr. 454; *Commonwealth v. Fleming*, Lewis's Crim. Law, 534; *Bigler v. O'Connor*, 32 Leg. Int. 355. So storing merchandise upon a street or road is not a lawful use of the public easement. *Coburn v. Ames*, 52 Cal. 385;

Orton v. Harvey, 23 Wis. 99; *Hundhausen v. Bond*, 36 Wis. 29.

² *Harrington v. Edwards*, 17 Wis. 586.

³ *Enos v. Hamilton*, 27 Wis. 256; 24 Wis. 658.

⁴ *Hart v. Albany*, 9 Wend. 570; 3 Paige, 213; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; *People v. Cunningham*, 1 Denio, 524. But see *Pilcher v. Hart*, 1 Humph. 524; *People v. Horton*, 64 N. Y. 610; 5 Hun, 516.

⁵ *McLean v. Mathews*, 7 Brad. (Ill.) 599.

above it.¹ This liability may be transferred with the transfer of the possession and control to another person.² If an unavoidable accident causes a vessel to sink, the law does not add to the owner's misfortune by requiring him to remove the impediment to navigation which the wreck may create, or to mark its position by a buoy or light.³ If he abandons the vessel, his duty and responsibility cease; but if he retains the possession and control, he is bound to take proper precautions for the safety of the public.⁴ These rules apply also where bridges, dams, or houses, swept away by extraordinary floods or by high winds, without negligence on the part of the owners, become obstructions to navigation, or encumber riparian estates.⁵ In Kentucky, it has been held that the owner of a boat which sinks in a navigable stream between high and low-water mark is liable for any damages thereby caused to the owner of the soil on which it lies, if he does not remove it within a reasonable time.⁶ Where a rail-

¹ *Brown v. Mallett*, 5 C. B. 599; *White v. Crisp*, 10 Exch. 312, 321.

² *Ibid.*

³ *Ibid.*, *King v. Watts*, 2 Esp. 675; *Hancock v. York Railway Co.*, 10 C. B. 348; *The Swan*, 3 Blatch. 285.

⁴ *Harmond v. Pearson*, 1 Camp. 515; *White v. Crisp*, 10 Exch. 312; *Brown v. Mallett*, 5 C. B. 599; *Boston Steamboat Co. v. Munson*, 117 Mass. 34; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275; 9 Bosw. 369; 2 Bosw. 106; *Sheldon v. Sherman*, 42 N. Y. 484; *Eads v. Brazelton*, 22 Ark. 499; *Missouri River Packet Co. v. Hannibal Railroad Co.*, 1 McCrary, 281; *Winpenny v. Philadelphia*, 65 Penn. St. 135; *Eads v. Brazelton*, 22 Ark. 499.

⁵ *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9, 24; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Livezey v. Philadelphia*, 64 Penn. St. 106; *Roush v. Walter*, 10 Watts, 86; *Winpenny v. Philadelphia*, 65 Penn. St. 135; *Withers v. North Kent Railway Co.*, 3 H. & M. 969. A bridge or way is negligently constructed if built of earth in the channel of a stream,

where it may be swept away by floods. *Kansas Pacific Railway Co. v. Miller*, 2 Col. 442; *Kansas Pacific Railway Co. v. Lundin*, 3 Col. 94. It seems to be doubtful whether at common law it was the duty of cities and towns to keep their ports free from obstructions. See *Hale, De Portibus Maris*, c. 7; 1 Hawk. P. C. c. 32, § 13; *Colchester v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 Ad. & El. 314. In *Winpenny v. Philadelphia*, 65 Penn. St. 135, 140, *Agnew, J.*, said: "The general understanding in this country is that the clearing out of streams and removing obstructions to navigation belong to the State or the United States, according to the character of the stream, as confined within State limits or as extending beyond, and necessary to inter-state commerce. Yet it is not a duty of perfect obligation, but one of voluntary assumption or imperfect obligation, inasmuch as it cannot be enforced against the will of the State." See *ante*, § 90.

⁶ *Morrison v. Thurman*, 17 B. Mon. 267.

road company employed a contractor to build a bridge, and for that purpose to drive piles in a river, and, the contract being abandoned, the piles were left in the river in a condition dangerous to vessels, the company was held responsible for injuries to a vessel which struck thereon, although the vessel was prosecuting her voyage on Sunday.¹ Where, however, piles were left by the defendants in a navigable river in such condition that a vessel could not be injured by them without gross negligence, and, being then sold and cut off by the buyer even with the bottom of the river, they afterwards protruded above the bed in consequence of a washing away of the soil and injured a vessel, the defendants were held not liable.²

§ 99. The early authorities were to the effect that, under the law of England, as by the civil law prevailing upon the continent of Europe and in Louisiana, the right of navigation includes the right to use the shores or banks of navigable waters for the purpose of fastening vessels, and for towing barges, to whomsoever the soil belongs; and that, if the water of the river impairs the banks, the public have a right of way for the purpose of towing in the nearest part of the fields next adjoining to the river.³ But, in the case of *Ball v. Herbert*,⁴ it was held that the right of towage depends upon usage or statute, and that there was no general right to use the banks of English rivers for this purpose. This decision determined the rule of the common law, by which, as now established, the right of navigation ceases at the high-water mark of tide waters, and at the water's edge

¹ *Philadelphia Railroad Co. v. Philadelphia Towboat Co.*, 23 How. 209.

² *Bartlett v. Baker*, 3 H. & C. 153.

³ *Young v. —*, 1 Ld. Raym. 725; *Queen v. Cluworth*, 6 Mod. 163; *Pierse v. Fauconberg*, 1 Burr. 292; *Bracton*, lib. 1, c. 12, fol. 6; *Just. Inst.* lib. 2, tit. 1, fol. 4; *Cooper's Justinian*, lib. 2, tit. 1; *Civil Code of La.* art. 443, 1446; 3 *Com. Dig.* tit. *Chimin*, D. 4; *Hale, De Portibus Maris*, c. 7; *Hargrave's Law Tracts*, 79, 85, 86;

Callison Sewers, 73; *Carrollton Railroad Co. v. Winthrop*, 5 La. Ann. 36; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; *Natchitoches v. Coe*, 3 *Martin n.s.* 140; *New Orleans v. New Orleans Railroad Co.*, 27 La. Ann. 414; *Pulley v. Municipality No. 2*, 2 La. 278; *Hanson v. Lafayette*, 18 La. 295; *McKeen v. Kurfurt*, 10 La. Ann. 523.

⁴ 3 T. R. 253.

in the case of navigable fresh waters.¹ The public have, therefore, as against the riparian owners, and as incident to the right of navigation, no common-law right to use the lands adjoining a river above high-water mark for the purpose of landing and embarkation, or of mooring.² Proof of necessity or danger would not apparently free the navigator from liability for appreciable damage thus caused to a riparian proprietor.³ Those who travel upon the banks of streams for the purpose of propelling their logs are liable in trespass to the owner of the banks,⁴ and he may require from navigators such price as he chooses for the use of the shore in loading and unloading vessels, if he gives notice of the charge before his property is so used.⁵

§ 100. It was early laid down that fishermen may go on land adjoining the sea to fish, that being for the common

¹ *Ball v. Herbert*, 3 T. R. 253; *Williams v. Wilcox*, 8 Ad. & El. 314; *Blundell v. Catterall*, 5 B. & Ald. 263; *Gray v. Bond*, 2 Brod. & Bing. 667; *Brown v. Chadbourne*, 31 Maine, 9, 25; *Treat v. Lord*, 42 Maine, 552, 564; *Hooper v. Hobson*, 57 Maine, 273, 276; *Ledyard v. Ten Eyck*, 36 Barb. 102, 127; *Lorman v. Benson*, 8 Mich. 18, 27; *Reimold v. Moore*, 2 Brown (Mich.) 15; *Ensminger v. People*, 47 Ill. 384, and *Chicago v. Laffin*, 49 Ill. 172, (overruling, apparently, the *dicta* in *Middleton v. Pritchard*, 3 Scam. 510, 521, 522). *Chambers v. Furry*, 1 Yeates, 167; *Bird v. Smith*, 8 Watts, 434; *Ball v. Slack*, 2 Whart. 530; *Morgan v. Reading*, 3 S. & M. 366; *The Magnolia v. Marshall*, 39 Miss. 109, 131; *Bell v. Gough*, 23 N. J. L. 624, 677; *Bainbridge v. Sherlock*, 29 Ind. 364; *Sherlock v. Bainbridge*, 41 Ind. 35; *Talbot v. Grace*, 30 Ind. 389; *Bickel v. Polk*, 5 Harr. (Del.) 325. See Greenwich Board of Works v. Maudslay, L. R. 5 Q. B. 397. In *O'Fallon v. Daggett*, 4 Mo. 342, in which the effect of an early grant from the king of Spain was discussed, the

banks of navigable rivers were held to be public highways, upon the authority of writers upon the civil law. See, also, *Memphis v. Overton*, 3 Yerger, 387; *Benson v. Morrow*, 61 Mo. 345; *Lewis v. Keeling*, 1 Jones (N. C.) 299; *Dalrymple v. Mead*, 1 Grant's Cas. (Penn.) 197.

² *Ibid.*; *Ensminger v. People*, 47 Ill. 384; *Stewart v. Fitch*, 2 Vroom, 17, 20.

³ *Hale*, De Portibus Maris, c. 3; *Hargrave's Law Tracts*, 51; *Blundell v. Catterall*, 2 B. & Ald. 268; *Wyatt v. Thompson*, 1 Esp. 252; *Morrison v. Thurman*, 17 B. Mon. 249, 257; 14 *Ibid.* 367; *Morgan v. Reading*, 3 S. & M. 366, 407; *The Magnolia v. Marshall*, 39 Miss. 109, 132; *Bell v. Gough*, 23 N. J. L. 624, 677; *Weise v. Smith*, 3 Oreg. 445; *Bainbridge v. Sherlock*, 29 Ind. 364; *Sherlock v. Bainbridge*, 41 Ind. 35. See *Gunning on Tolls*, 126.

⁴ *Hooper v. Hobson*, 57 Maine, 273. See *Weise v. Smith*, 3 Oreg. 445.

⁵ *Steamer Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 S. & M. 366; *Commissioners v. Withers*, 29 Miss. 21.

good, though they cannot justify digging there for the purpose of fixing stakes upon which to dry their nets;¹ but it is now settled that the public right of fishery affords no justification for any act committed upon the dry land, in the absence of a prescriptive right.² A littoral proprietor has the exclusive right to draw a boat or seine on his own land,³ to erect fishing huts there,⁴ or to fix stakes in his own flats below the high-water mark of tide waters for the purpose of spreading a seine.⁵ If the proprietor of land on which a seine reel is placed, without his license, cuts it down and thrusts it toward the water, after notice to remove it, and neglect to do so, he is not liable if the reel floats away, although he might have prevented it.⁶ The right to draw a seine upon the land of another person is an easement, and when acquired by prescription, its extent is commensurate with, and is determined by the previous user.⁷

§ 101. If the public acquire the right to use a river bank as a towing path by grant, user, or dedication, the title to the bank remains *prima facie* vested in the original owners, subject to the public right to use it as a highway in this particular manner.⁸ The banks of a navigable stream may be

¹ Brooke's Abr. tit. Custom, pl. 46; Fitz. Barre, 93.

² Gray v. Bond, 2 Brod. & Bing. 667; Holroyd, J., in Blundell v. Catterall, 5 B. & Ald. 268; Coolidge v. Williams, 4 Mass. 140; Hart v. Hill, 1 Whart. 138; Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71; Cortelyou v. Van Brundt, 2 Johns. 357; Jacobson v. Fountain, 2 Johns. 170; Whittaker v. Burhaus, 62 Barb. 237; Brink v. Ritchmyer, 14 Johns. 255; Lay v. King, 5 Day, 72; Sheppard's Epitome, tit. Custom & Prescription, p. 392; Woolrych on Waters, 138; Hale, De Jure Maris, c. 6; Hargrave's Law Tracts, p. 86; 2 Dane's Abr. 702, 707; Duncan v. Sylvester, 24 Maine, 482.

³ Ibid.; Skinner v. Hettrick, 73 N. C. 53; Hettrick v. Skinner, 82 N. C. 65, 68; Bradley Fish Co. v. Dudley,

37 Conn. 136; Locke v. Motley, 2 Gray, 265. A person who clears out a fishing place in a river acquires thereby no exclusive right of fishery. Westfall v. Van Anker, 12 Johns. 425; Freary v. Cooke, 14 Mass. 488. See Pitkin v. Olmstead, 1 Root, 219; Munson v. Baldwin, 7 Conn. 171. But a fishing place may be granted separate from the soil. Tinicum Fishing Co. v. Carter, 61 Penn. St. 21.

⁴ Ibid.

⁵ Locke v. Motley, 2 Gray, 265; Duncan v. Sylvester, 24 Maine, 482; Whitaker v. Burhaus, 62 Barb. 237; 65 N. Y. 559; 2 Dane Abr. 692.

⁶ Almy v. Grinnel, 12 Met. 53.

⁷ Hart v. Hill, 1 Whart. 138; Bald. Ct. Dig. 339, pl. 12, 13.

⁸ Winch v. Conservators of the River Thames, L. R. 7 C. P. 471; L.

appropriated by statute to the use of the public as a towing path.¹ In such case, also, the riparian proprietors retain the ownership of the soil subject to the public easement, unless the language of the statute shows an intention to take the fee for the purpose of the act;² the rule being that, in the absence of express words, the courts do not infer that a statute of this kind gives to the public, or to a board of conservators, or navigation companies, acting in the public interest, a greater interest in the soil than is necessary for the purposes of the navigation.³

§ 102. The only instance in which the common law recognizes the right of the public to enter upon the land of a riparian owner above high-water mark, in connection with the right of navigation, appears to be for the purpose of reclaiming stranded property which may have been washed ashore without fault on the part of its owner.⁴ In Maine

R. 9 C. P. 378; *Rex v. Severn Navigation Co.*, 2 B. & A. 646; *Hollis v. Goldfinch*, 1 B. & C. 205; *Lee Conservancy Board v. Button*, 12 Ch. D. 383.

¹ *Winch v. Conservators of the River Thames*, L. R. 7 C. P. 471; *Lee Conservancy Board v. Button*, 12 Ch. D. 383.

² *Ibid.*; *Carpenter v. State*, 12 Ohio St. 457; *Indiana Central Canal Co. v. State*, 53 Ind. 575. A canal and its towing paths, which are directed by statute to be kept in repair for the use of the public, are highways. *Bosley v. Susquehanna Canal*, 3 Bland, 63.

³ *Badger v. South Yorkshire Railway Co.*, 1 El. & El. 346, 359, 368; *Reg. v. Archbishop of York*, 14 Q. B. 81; *Hollis v. Goldfinch*, 1 B. & C. 205; *Bruce v. Willis*, 11 A. & E. 463; *Lee Conservancy Board v. Button*, 12 Ch. D. 383; *Monmouthshire Canal Co. v. Hill*, 4 H. & N. 421; *Kinlock v. Neville*, 6 M. & W. 795; *Newcastle v. Clarke*, 2 B. Moore, 666; *Buckeridge v. Ingram*, 2 Ves. Jr. 652; *Stanley v. White*, 14 East, 332; *New Shoreham Harbor Commissioners v. Lansing*,

L. R. 5 Q. B. 489; *Rex v. Mersey Navigation*, 9 B. & C. 95; *Rex v. Thomas*, *Ibid.* 114; *Rex v. Aire Navigation*, *Ibid.* 820; 3 B. & Ad. 139; *Cory v. Bristow*, 2 App. Cas. 262; *Simpson v. Staffordshire Water Co.*, 4 De G. J. & S. 679; *Somerset Canal v. Harcourt*, 2 De G. & J. 596; *Chelsea Water Co. v. Bowley*, 17 Q. B. 358; *Patrick v. Beaufort*, 6 Exch. 498; *Robins v. Warwick*, 2 Bing. (N. C.) 483; *Harborough v. Shadlow*, 7 M. & W. 37; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 794. A person who, being seized of land, conveys to a canal company "such portion and quantity of his land as may be covered, used, or occupied by the said canal, or the necessary works thereof," and describes the premises conveyed, does not surrender the privilege of using public highways passing through the granted premises. *Leopold v. Chesapeake Canal Co.*, 1 Gill, 222; *Carpenter v. State*, 12 Ohio-St. 457.

⁴ *Carter v. Thurston*, 58 N. H. 104, 107; *Hoit v. Stratton Mills*, 54 N. H. 109, 116; *Aldrich v. Wright*, 53 N. H.

the right to reclaim stranded logs is expressly recognized by a statute which requires payment or tender of compensation for damages.¹ The common-law rule is that a person whose property is carried, by flood or inevitable accident, upon another's land, and who elects to reclaim and not abandon it, becomes responsible, immediately upon its removal, for the damage done by the property upon such land; and the law implies, in such case, a promise of compensation, upon which, in the absence of an express promise, an action may be maintained.² In case a bridge is carried away and the materials do injury upon another's land, the owner would doubtless be liable if the bridge was negligently constructed.³

§ 103. A corporation which is authorized by statute to construct booms upon a river for the purpose of holding and storing logs, acquires thereby no right to appropriate and use the banks, except by the consent of the owners, or in the exercise of the power of eminent domain.⁴ This property cannot be taken for a purely private purpose; and the fact that booming companies and companies for the improvement of the navigation are *quasi* public corporations, and hold their franchises for a public use,⁵ does not give them

398; *Brown v. Collins*, *Ibid.* 442, 449; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 558; *Eaton v. B. C. & M. Railroad Co.*, 51 N. H. 504, 530; *Brown v. Chadbourne*, 31 Maine 9, 24; *Treat v. Lord*, 42 Maine, 552; *Colchester v. Brooke*, 7 Q. B. 339; *Rogers v. Judd*, 5 Vt. 223; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393. If the logs or timber of different owners, floated into a river, become so mixed that the property of each cannot be identified, they become tenants in common. *Moore v. Erie Railway Co.*, 7 Lans. 39.

¹ Rev. Stats. of Maine (1857), c. 42, § 8; Rev. Stats. (1871), c. 42, §§ 7, 8; *Hooper v. Hobson*, 57 Maine, 276; *Brown v. Chadbourne*, 31 Maine, 9; *Treat v. Lord*, 42 Maine, 552.

² *Ibid.*; *Sheldon v. Sherman*, 42 N. Y. 484.

³ *Livezey v. Philadelphia*, 64 Penn.

St. 106. The carrying away, by flood, of a bridge not part of the demised premises, whereby their value is diminished, is no ground for an abatement of the rent. *Smith v. Ankrim*, 13 S. & R. 391.

⁴ *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Carpenter v. State*, 12 Ohio St. 457. If a public road, which has been legally established along the banks of a river by condemnation of the land of an individual proprietor, is washed away by a flood, there is no right of necessity to use the adjoining land for the highway without a new condemnation and compensation for the same. *Commonwealth v. Beeson*, 3 Leigh, 281. They may, however, use such land temporarily for the purpose of passage. *Ball v. Herbert*, 3 T. R. 253, 263; *ante*, § 99.

⁵ *Attorney General v. Railroad Co.*,

the privileges of a riparian owner, or enable them, by legislative authority, to devote the river banks to the purposes of their charter, without compensation to the riparian owners.¹ Compensation is also necessary where the banks are flooded by public improvements,² or by dams erected for the collection and storage of logs, or by a collection of logs in great numbers;³ where the value of the banks for boom purposes is injured by dams erected under legislative authority for supplying a city with water;⁴ and where a landing and buildings used in connection with a fishery are destroyed by the construction of a railroad.⁵ The liberty of a ferry is limited by high-water mark upon either shore;⁶ and it has been held that such a franchise, conferred by the legislature, carries with it no right, without the riparian owner's consent, or the payment of compensation, to use the land adjoining the river above high-water mark as a landing, even though such land is already subject to an easement in favor of the public for the purpose of a highway.⁷ But if a highway extends to

35 Wis. 425; *Wisconsin Railroad Co. v. Manson*, 43 Wis. 255; *Delaphine v. Railroad Co.*, 42 Wis. 214; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; 44 Wis. 295; *Denniston v. Unknown Owners*, 29 Wis. 351; *Pound v. Turck*, 95 U. S. 459; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Lawler v. Boom Co.*, 56 Maine, 443; *Perry v. Wilson*, 7 Mass. 393; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. Eq. 200, 204; *Sinnickson v. Johnson*, 2 Har. (N. J.) 129, 152; *Brady's Appeal*, 26 Md. 290; *Texas Navigation Co. v. Galveston Co.*, 45 Texas, 274.

¹ *Ibid.*; *Schoff v. Upper Connecticut River Co.*, 57 N. H. 110; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; 46 Wis. 237; *Reimold v. Moore*, 2 Brown (Mich.) 15; *Hargrave's Law Tracts*, 79; *Bath River Navigation Co. v. Willis*, 2 Railway & Canal Cases, 7; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Hooker v. New Haven Co.*, 15 Conn. 321; *Monongahela Navigation Co. v. Coons*, 6 Penn.

St. 379. A state may authorize a corporation to take the fee of private property for the purpose of constructing a boom. *Patterson v. Mississippi Boom Co.*, 3 Dillon, 465.

² *Harper v. Milwaukee*, 30 Wis. 365; *Arimond v. Green Bay Canal Co.*, 31 Wis. 316; 35 Wis. 41; *Cobb v. Smith*, 23 Wis. 261; 38 Wis. 21; *Sheboygan v. Sheboygan Railroad Co.*, 21 Wis. 667.

³ *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336. If the dam of a navigation company chartered by the State raises the water at a ford so as to render it unfordable, the right to use the ford is merely suspended, and is restored upon the destruction of the dam. *Crump v. Mims*, 64 N. C. 767; *Bisher v. Richards*, 9 Ohio, 495.

⁴ *Barrett v. Bangor*, 70 Maine, 335.

⁵ *Alexandria Railway Co. v. Faunce*, 31 Gratt. 761.

⁶ *State v. Wilson*, 42 Maine, 9; *French v. Camp*, 18 Maine, 433.

⁷ *Prosser v. Wapello County*, 18

navigable waters, the better doctrine would seem to be that the riparian owner has no exclusive right of landing.¹

§ 104. The right of towage along the banks of navigable rivers resembles the right of passage upon a highway. It may be acquired by the public by custom or prescription;² and Lord Kenyon suggests that small evidence of usage would be sufficient before a jury to establish the right by custom, upon grounds of public convenience.³ Analogous to this is the right of way to navigable waters from lands lying inward. Tide waters are common property with respect to navigation and fishing, but the public have no general right of access to them over private lands.⁴ This privilege cannot be claimed as a right of necessity,⁵ but depends, as in the case of highways generally, upon statute, or upon grant, dedication, or prescription.⁶ It is competent for the legislature to take private property for public use as a wharf, landing place, or ferry landing;⁷ and to authorize a town to

Iowa, 327; *Prosser v. Davis*, *Ibid.* 367; *Cooper v. Smith*, 9 Serg. & R. 26; *Chambers v. Furry*, 1 Yeates, 16; *Chess v. Manown*, 3 Watts, 219; *Bird v. Smith*, 8 Watts, 434; *Pipkin v. Wynns*, 2 Dev. (N. C.) 402. See *Memphis v. Overton*, 3 Yerger, 387, 390; *Levisay v. Delp*, 9 Baxter, 415.

¹ *Fowler v. Mott*, 19 Barb. 204; *Burrows v. Gallup*, 32 Conn. 499; *Church v. Meeker*, 34 Conn. 429; *Somerville v. Wimbish*, 7 Gratt. 205; *Peter v. Kendal*, 3 B. & C. 703; *Newton v. Cubitt*, 12 C. B. N. s. 32; *Gant v. Drew*, 1 Oreg. 35; *Mills v. Learn*, 2 Id. 215; *Mills v. Commissioners*, 3 Scam. 53; *Patrick v. Ruffner*, 2 Rob. 209; 3 Kent Com. 421; *Walker v. Armstrong*, 2 Kansas, 198; *N. Y. v. N. Y. Ferry Co.*, 40 N. Y. Sup. Ct. 232, 246.

² *Ball v. Herbert*, 3 T. R. 253; *Kinlock v. Neville*, 6 M. & W. 794; *Badger v. South Yorkshire Railway Co.*, 1 El. & El. 347; *Monmouth Canal Co. v. Hill*, 4 H. & N. 427; *Hollis*

v. Goldfinch, 1 B. & C. 205; 1 Burr. 292; *Harrington v. Edwards*, 17 Wis. 586.

³ *Ball v. Herbert*, 3 T. R. 253.

⁴ *Blundell v. Catterall*, 5 B. & Ald. 268; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Coolidge v. Williams*, 4 Mass. 440; *Bickel v. Polk*, 5 Harr. (Del.) 325.

⁵ *Lawton v. Rivers*, 2 McCord (S. C.) 445; *Turnbull v. Rivers*, 3 *Ibid.* 131; *Seabrook v. King*, 1 Nott & McC. 140.

⁶ *Ante*, § 99; *White v. Whittier*, 2 Dane's Abr. 702.

⁷ *Memphis v. Wright*, 6 Yerger, 497; *Bainbridge v. Sherlock*, 29 Ind. 364; 41 Ind. 35; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70; *Muire v. Falconer*, 10 Gratt. 12; *Anderson v. St. Louis*, 47 Mo. 479; *Leslie v. St. Louis*, 47 Mo. 474; *Phipp's Appeal*, 28 Md. 380; *Mayor v. State*, 4 Ga. 26; *Martin v. O'Brien*, 34 Miss. 21; *Yadkin Navigation Co. v. Benton*, 2 Hawks (N. C.) 10; *Barrington v. Neuse*

convert a promenade into wharfs and landings.¹ But without authority from the legislature, a town cannot convert a private wharf or landing into a town way.²

§ 105. In *Pearsall v. Post*,³ in New York, in which it appeared that land adjoining a harbor had been used for many years as a place for the landing and deposit of large quantities of manure brought from the city of New York, it was held: first, That the right to encumber lands adjoining navigable waters with manure or merchandise, being more than a simple right of passage, could not be acquired by the public by custom or prescription; second, That the doctrine of parol dedication of highways, streets, and public squares does not extend to public landings. In *Talbot v. Grace*,⁴ in Indiana, there was evidence that the place in question had been long used both for the purpose of a landing, and for the loading and unloading of vessels, and one ground of the decision was, following *Pearsall v. Post*,⁵ that the public right could not rest upon the ground of prescriptive user. In Massachusetts, the public may, by immemorial usage, acquire the right to use the banks of a river for the purpose of landing.⁶ The same doctrine was early

River Ferry Co., 69 N. C. 165. The right of jury trial, to determine the value of the land so taken, must be secured to the land-owner. *Day v. Stetson*, 8 Maine, 365. But a horse ferry is not of such public interest as to justify taking private property for its establishment. *Day v. Stetson*, 8 Maine, 365.

¹ *Memphis v. Wright*, 6 Yerger, 497.

² *Kean v. Stetson*, 5 Pick. 492, 495.

³ 20 Wend. 111; 22 Wend. 425; *Pearsall v. Hewlett*, 20 Wend. 111; 22 Wend. 559. See also *Cortelyou v. Van Brundt*, 2 Johns. 357; *Hunter v. Sandy Hill*, 6 Hill, 407, 411; *Cady v. Conger*, 19 N. Y. 256; *Bloomfield Gas Light Co. v. Calkins*, 62 N. Y. 386; *Munson v. Hungerford*, 6 Barb. 265;

Adams v. Rivers, 11 Barb. 390; *Wiggins v. Tallmadge*, 11 Barb. 457; *Curtis v. Keesler*, 14 Barb. 511; *Smith v. Floyd*, 18 Barb. 522; *Fowler v. Mott*, 19 Barb. 204; *Etz v. Daily*, 20 Barb. 32; *Kelsey v. King*, 33 How. Pr. 30; 1 N. Y. Trans. App. 133.

⁴ 30 Ind. 389.

⁵ 20 Wend. 111; 22 Wend. 425.

⁶ *Kean v. Stetson*, 5 Pick. 492; *Coolidge v. Learned*, 8 Pick. 504; *Green v. Chelsea*, 24 Pick. 80; *Boston v. Richardson*, 105 Mass. 351, 357. In North Carolina the use of a landing by the public for twenty years as of right affords ground for a presumption of dedication to the public use. *Askew v. Wynne*, 7 Jones, 22. See, also, *Hardy v. Memphis*, 10 Heisk. 127; *Barney v. Baltimore*, 1 Hughes, 118.

recognized in Maine.¹ But in the latter State a general right to use the river banks as a place of deposit cannot now be acquired by custom;² and a landing, even for the purpose of direct transit, is held to be more than a highway.³ In Minnesota⁴ and Wisconsin⁵ the doctrine that land cannot be dedicated by parol as a landing has been disapproved; and in Iowa⁶ and Kentucky⁷ it has been held that land dedicated to the public use as a street or common may be used for the purposes of a wharf. In *Godfrey v. Alton*,⁸ the Supreme Court of Illinois held that a parol dedication of land is not within the Statute of Frauds, and that, if the owner of the land makes a survey and lays it off by plat for public use as a landing, and makes sales in reference thereto, such acts amount to a dedication, although there are no declarations, either oral or on the plat, showing that a dedication was in-

¹ *Sevey's Case*, 6 Maine, 118.

² *Littlefield v. Maxwell*, 31 Maine, 134; *Bethum v. Turner*, 1 Maine, 111; *Moor v. Lang*, 42 Maine, 29; *State v. Wilson*, 42 Maine, 9; *Hill v. Lord*, 48 Maine, 83, 100; *Stetson v. Bangor*, 60 Maine, 313.

³ *Ibid.*; *State v. Wilson*, 42 Maine, 9. See *Hasty v. Johnson*, 3 Maine, 282; *Thompson v. Androscoggin Bridge*, 5 Maine, 62; *Kaler v. Beaman*, 49 Maine, 207. The grant of a saw-mill, "with a convenient privilege to pile logs, boards, and other lumber," conveys only an easement in the land used for piling. *Thompson v. Proprietors*, 5 Maine, 62.

⁴ *Mankato v. Willard*, 13 Minn. 13; *Brisbine v. St. Paul Railroad Co.*, 23 Minn. 114.

⁵ *Gardiner v. Tisdale*, 2 Wis. 153; *Connehan v. Ford*, 9 Wis. 240. See, also, *Bird v. Smith*, 8 Watts, 434; *Chambers v. Furry*, 1 Yeates, 167.

⁶ *Haight v. Keokuk*, 4 Iowa, 199, 214; *Grant v. Davenport*, 18 Iowa, 179; *Cowles v. Gray*, 14 Iowa, 1. See *Bingham v. Doane*, 9 Ohio, 165; *State v. Graham*, 15 Rich. (S. C.) 310; *Sloane v. McConahy*, 4 Ohio, 157, and note; *Price v. Methodist Episco-*

pal Church, Id. 516; *Cincinnati v. 1st Presbyterian Church*, 8 Ohio, 298; *Cincinnati v. Hamilton Co.*, 7 Ohio, 88; *Commonwealth v. Philadelphia*, 16 Penn. St. 79; *State v. Randall*, 1 Strob. (S. C.) 110. As to the meaning of the words "reserved landing" upon a recorded plat, see above cases of *Grant v. Davenport* and *Cowles v. Gray*. See, also, *Emmons v. Milwaukee*, 32 Wis. 434; *Dietrich v. Northwestern Union Railway Co.*, 42 Wis. 248; *Cook v. Burlington*, 30 Iowa, 94; 36 *Ibid.* 357; *Mankato v. Meagher*, 17 Minn. 265; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118.

⁷ *Newport v. Taylor*, 16 B. Mon. 699, 804; *Rowan v. Portland*, 8 B. Mon. 236; *Louisville v. Bank of the United States*, 3 B. Mon. 138.

⁸ *Godfrey v. Alton*, 12 Ill. 30; *Alton v. Illinois Transportation Co.*, *Ibid.* 38; *Field v. Carr*, 59 Ill. 198, 200; *First Evangelical Church v. Walsh*, 57 Ill. 363, 369; *Smith v. Flora*, 64 Ill. 93; *McIntire v. Storey*, 80 Ill. 127, 130; *Warren v. Jacksonville*, 15 Ill. 236; *Waugh v. Leech*, 28 Ill. 483, 491; *Rees v. Chicago*, 38 Ill. 322. See *Newport v. Taylor*, 16 B. Mon. 699, 803; *Rowan v. Portland*, 8 B. Mon. 232.

tended. The result of the authorities seems to be that a dedication of land adjoining a river for the purpose of public passage to and from the water, with perhaps the incidental right of temporary deposit,¹ or a claim of prescriptive user, for the purpose of landing and embarkation, is valid; but that the right to encumber the land with lumber, merchandise, and the like, to a greater extent or for a longer time than would be permissible in a highway,² is neither within the purpose of the dedication nor valid as a custom.³

§ 106. When a way in a city extends to navigable waters, and is dedicated to the public use as a street, it carries with it, by necessary implication, the right of the city to extend it into the water by the construction of a wharf at the end thereof.⁴ Evidence that land has been used as a landing place by the inhabitants of the town in which it is situated, and, also, by those of other towns, is sufficient to establish a right in all the inhabitants of the State.⁵ But evidence of user by the individual inhabitants of a town does not tend to show a possession by the town in its corporate capacity.⁶ When a

¹ See *Gardiner v. Tisdale*, 2 Wis. 153, 191; *Knowles v. Dow*, 22 N. H. 387.

² See *People v. Cunningham*, 1 Denio, 524; *Gerrish v. Brown*, 51 Maine, 256, 263; *Graves v. Shattuck*, 35 N. H. 257.

³ See authorities above cited. Also, *Penny Pot Landing*, 16 Penn. St. 79; *Carrollton Railroad Co. v. Winthrop*, 5 La. Ann. 36. As to the reservation and dedication of landings by the government, or by cities, see *Cincinnati v. White*, 6 Peters, 431; *Barclay v. Howell*, *Ibid.* 498; *Irwin v. Dixon*, 9 How. 10; *New Orleans v. United States*, 10 Peters, 662; *Cook v. Burlington*, 30 Iowa, 94; 36 *Ib.* 357; *Walker v. Columbus*, 4 B. Mon. 259, 260; *Alves v. Henderson*, 16 B. Mon. 131; *Burr v. Dana*, 22 Cal. 11; *Blanc v. Bowman*, 22 Cal. 23; *San Francisco v. Calderwood*, 31 Cal. 385; *Schermerhorn v. New York*, 3 Edw. Ch. 119.

Dedication may be presumed even against the sovereign. *Day v. Allender*, 22 Md. 511. In conveyances between individuals, a deed of a mill, dam, and falls, "and a right to the road and landing, to land logs, as has been customary," conveys only an easement in the road and landing. *Hasty v. Johnson*, 3 Maine, 282. And the grant of a saw-mill "with a convenient privilege to pile logs, boards, and other lumber," conveys only an easement in the land used for piling. *Thompson v. Androscoggin Bridge*, 5 Maine, 62.

⁴ *McMurray v. Baltimore*, 54 Md. 103; *Barney v. Keokuk*, 94 U. S. 324; *Haight v. Keokuk*, 4 Iowa, 199; *Bowman v. Portland*, 8 B. Mon. 253; *Newport v. Taylor*, 16 B. Mon. 700; *Barney v. Baltimore*, 1 Hughes, 118.

⁵ *Coolidge v. Learned*, 8 Pick. 504.

⁶ *Green v. Chelsea*, 24 Pick. 71; *Hill v. Lord*, 48 Maine, 83, 97.

public landing place is once established, it may be discontinued by the legislature, but not by a town,¹ or by county commissioners.² Commissioners of highways, having authority to regulate public landings and watering-places, have no power to lay out a new landing place.³

§ 107. A stream is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property. Lord Hale says that the right of navigation extends to rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges, boats, or lighters.⁴ He does not refer to it as extending to streams which are navigable during a part of the year, or to those which, being unnavigable for boats at ordinary water, are useful, either at all seasons or in times of freshets, for floating rafts and logs to market. In this country, where this question is more important than in England, notwithstanding the conflict respecting the title to large fresh-water rivers, the authorities agree that streams which in their natural condition are only useful for rafting purposes during the whole or a part of each year, are highways for that purpose, and that the title of the riparian owners⁵ to the beds of such streams is subject to this right of passage.

§ 108. Streams which are not floatable, or cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are absolutely private,⁶ and if the stream is so small and shallow that logs cannot be driven in them without trav-

¹ *Commonwealth v. Tucker*, 2 Pick. 44; *Kean v. Stetson*, 5 Pick. 492, 495.

² *Bennett v. Clemence*, 6 Allen, 10.

³ *Commissioners v. Queen's County*, 17 Wend. 9.

⁴ Hale, *De Jure Maris*, c. 2, 3; *Hargrave's Law Tracts*, 8, 9.

⁵ *Post*, § 110.

⁶ *Berry v. Carle*, 3 Maine, 269; *Spring v. Russell*, 7 Maine, 273; *Wadsworth v. Smith*, 11 Maine, 278; *Dwinel v. Barnard*, 28 Maine, 554; *Brown*

v. Chadbourne, 31 Maine, 9; *Treat v. Lord*, 42 Maine, 552; *Knox v. Chaloner*, *Ibid.* 150; *Brown v. Black*, 43 Maine, 443; *Dwinel v. Veazie*, 44 Maine, 167; *Veazie v. Dwinel*, 50 Maine, 479; *Gerrish v. Brown*, 51 Maine, 256; *Davis v. Winslow*, *Ibid.* 264; *Lancey v. Clifford*, 54 Maine, 487; *Holden v. Robinson Co.*, 65 Maine, 215; *Lawler v. Baring Boom Co.*, 56 Maine, 443; *Hooper v. Hobson*, 57 Maine, 273.

elling upon the banks, it is not open to the public for passage.¹ It is not necessary that the stream, in order to be a highway, should be capable of floating logs at all seasons of the year, but its public character depends upon its fitness to answer the wants of those whose business requires its use.² The fact that the banks are commonly used for the purpose of towing or propelling what is floating, is evidence merely of want of capacity for public use.³ The test is the natural capacity of the stream, and the fact that those who drive logs trespass on the adjoining lands, or at times find it necessary or convenient to do so, does not deprive the stream of the public character which it may otherwise possess.⁴ Sub-

¹ *Brown v. Chadbourne*, 31 Maine, 9; *Treat v. Lord*, 42 Maine, 552; *Hooper v. Hobson*, 57 Maine, 273; *Morrison v. Bucksport Railroad Co.*, 67 Maine, 353; *Olson v. Merrill*, 42 Wis. 203; *Morgan v. King*, 35 N. Y. 454; 18 Barb. 277; 30 Barb. 9; *Munson v. Hungerford*, 6 Barb. 265; *Curtis v. Keesler*, 14 Barb. 511; *Shaw v. Crawford*, 10 Johns. 236; *Varick v. Smith*, 9 Paige, 547; *Browne v. Schofield*, 8 Barb. 239; *Palmer v. Mulligan*, 3 Caines, 307; *Ex parte Jennings*, 6 Cowen, 518; *Pierrepoint v. Loveless*, 72 N. Y. 211, 216; *Slater v. Fox*, 5 Hun, 544; *Moore v. Sanborne*, 2 Mich. 519; *Lorman v. Benson*, 8 Mich. 18; *Ryan v. Brown*, 18 Mich. 196; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Brig City of Erie v. Canfield*, 27 Mich. 479; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 345; *Attorney General v. Evart Booming Co.*, 34 Mich. 462; *Wood v. Rice*, 24 Mich. 423; *Scott v. Willson*, 3 N. H. 321; *Barron v. Davis*, 4 N. H. 338; *State v. Gilmanton*, 14 N. H. 467, 479; *Thompson v. Androscoggin Co.*, 54 N. H. 545; 58 N. H. 108; *Carter v. Thurston*, 58 N. H. 104, 107; *Whistler v. Wilkinson*, 22 Wis. 572; *Wiconsin River Co. v. Lyons*, 30 Wis. 61, 66; *Sellers v. Union Lumbering*

Co., 39 Wis. 525; *Olson v. Merrill*, 42 Wis. 203; *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 324; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; 46 Wis. 237; *Barclay Railroad Co. v. Ingham*, 36 Penn. 194; *Hickok v. Hine*, 23 Ohio St. 523; *Weise v. Smith*, 3 Oregon, 445; *Felger v. Robinson*, 3 Oregon, 455. See, also, *Commonwealth v. Chapin*, 5 Pick. 199, 202; *Blood v. Nashua Railroad Co.*, 2 Gray, 137; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Attorney General v. Woods*, 108 Mass. 436; *Neaderhouser v. State*, 28 Ind. 257; *Esson v. McMaster*, 1 Kerr (N. B.) 501; *Rowe v. Titus*, 1 Allen (N. B.) 326; *Boissonnault v. Oliva*, *Stuart* (Low. Can.) 564; *Hayward v. Knapp*, 23 Minn. 430; *Lamprey v. Nelson*, 24 Minn. 304; *Commonwealth v. Charlestown*, 1 Pick. 180; *Commonwealth v. Chapin*, 5 Pick. 199; *Knight v. Wilder*, 2 Cush. 199, 209; *Charlestown v. Middlesex Commissioners*, 3 Met. 202; *Attorney General v. Woods*, 108 Mass. 436.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*; *Holden v. Robinson Co.*, 65 Maine, 215. In Maine it is provided by statute that the banks of a stream may be used for driving logs. R. S. (1857) c. 42, §§ 7, 8; R. S. (1871) c. 42, §§ 7, 8. See *Brown v. Chadbourne*, 31 Maine, 9; *Treat v. Lord*, 42 Maine,

ject to these rules the question whether a stream is a highway is a question of fact for the jury.¹ A riparian proprietor who, by means of a dam, and by accumulating his own logs above the dam, intentionally prevents the passage of another's logs down the stream, is liable in damages for the delay and injury so caused. The person thus injured may lawfully boom the proprietor's logs, and repair and open his sluices, if such means of effecting a passage is the least injurious to the proprietor; and in his action he may recover, with his damages, the expenses which he incurs in thus securing a passage.² Mill-owners whose dams interfere with the reasonable use of floatable streams by the public are liable to a private action by any citizen so injured.³

§ 109. If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods ordinarily recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway. The mere possibility of occasional use during brief or extraordinary freshets does not give it a public character.⁴ A similar principle applies in the case of small tidal creeks, in which, although *prima facie* they are public and navigable, private property may be maintained.⁵ It is

552; Hooper v. Hobson, 57 Maine, 273.

¹ Treat v. Lord, 42 Maine, 552; Bryant v. Glidden, 36 Maine, 36.

² Brown v. Chadbourne, 31 Maine, 9; Dwinel v. Veazie, 44 Maine, 167; 50 Maine, 479; Gerrish v. Brown, 51 Maine, 256; Parks v. Morse, 52 Maine, 260; Veazie v. Dwinel, 50 Maine, 479. Upon the question what is a reasonable use of the stream, see *Ibid.*; Davis v. Winslow, 51 Maine, 264; Weise v. Smith, 3 Oregon, 445; Sewall's Fall Bridge v. Fisk, 23 N. H. 171; Carter v. Berlin Mills Co., 58 N. H. 52; Brown v. Kentfield, 50 Cal. 129; Enos v. Hamilton, 27 Wis. 256; 24 Wis. 658.

³ Parks v. Morse, 52 Maine, 260. As to what constitutes reasonable use,

see Davis v. Winslow, 51 Maine, 264; Lancey v. Clifford, 54 Maine, 487; Veazie v. Dwinel, 50 Maine, 479; Gerrish v. Brown, 51 Maine, 256, 263.

⁴ Munson v. Hungerford, 6 Barb. 265; Morgan v. King, 35 N. Y. 45; 18 Barb. 277; 30 Barb. 9; Curtis v. Keesler, 14 Barb. 511; Olson v. Merrill, 42 Wis. 203; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336; Middleton v. Flat River Booming Co., 27 Mich. 533; Hubbard v. Bell, 54 Ill. 110; Cates v. Wadlington, 1 McCord (S. C.) 580; Brown v. Chadbourne, 31 Maine, 9; Treat v. Lord, 42 Maine, 552.

⁵ Commonwealth v. Charlestown, 1 Pick. 180, 186, and authorities in next note.

not every small creek in which a fishing skiff or gunning canoe can be made to float at high tide which is deemed subject to public use; but in order to have a public character, it must be navigable for some purpose useful to business or pleasure.¹ The only decisions tending to limit the above right of floatage appear to be: first, that of *Hubbard v. Bell*,² in Illinois, in which it is said that no such necessity exists in that State, as in Maine or Michigan, for requiring private rights to yield to the floating of logs; but the stream to which this case related seems to have been capable of bearing rafts and logs only in seasons of freshets, and then for a few days or weeks only.³ Second, an early case in California in which it was held that a stream is navigable which has capacity to float rafts of lumber, but that the rule does not extend to streams which can only float logs or planks.⁴ Third, decisions in Alabama in which the duration of previous enjoyment by the public, as well as the extent to which the stream is floatable, are considered material in determining whether it is a public highway, and the question whether it is a highway is held to be a question of law for the court, after the facts are determined by a jury.⁵ In *Stump v. McNairy*,⁶ it was held that a private unnavigable brook which flows into a public navigable river, and is floatable in times of high water, becomes a public thoroughfare by being publicly used without objection for twenty years as an inlet for rafts.

§ 110. The rights of the public are not superior to private rights, in streams which are merely floatable, to the same ex-

¹ *Ibid.*; *Commonwealth v. Breed*, 4 Pick. 460; *Rowe v. Granite Bridge Co.*, 21 Pick. 344, 347; *Charlestown v. County Commissioners*, 3 Met. 202; *Murdock v. Stickney*, 8 Cush. 113, 115; *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Attorney General v. Woods*, 108 Mass. 436; *The Montello*, 20 Wall. 442, 443; *Getty v. Hudson River Railroad Co.*, 21 Barb. 617.

² *Hubbard v. Bell*, 54 Ill. 110.

³ *Ibid.* p. 114. See *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 343.

⁴ *American River Water Co. v. Amsden*, 6 Cal. 443.

⁵ *Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528; *Alabama v. Bell*, 5 Porter, 379.

⁶ 5 Humph. 363.

tent as in rivers which are capable of more extended navigation. In the latter the public right extends equally to all navigable portions of the river. But the right of floatage is not paramount to the use of the water for machinery, and the rights of the public and those of the riparian owners are both to be enjoyed with a proper regard to the existence and preservation of the other. If dams are so constructed as to limit the public passage to a small portion of the stream, and sufficient provision is made for the passage of logs, the public cannot complain, while those who exercise the right of floatage are liable to the riparian owners for such exercise of the common right as causes them an injury.¹ In streams which are only floatable, the riparian owner is only bound not to obstruct its reasonable use for that purpose.² If he obstructs the stream by making a new channel into which its waters are turned, the public are authorized to use it for floating logs and rafts as they had been accustomed to use the old channel;³ and if the new channel becomes obstructed, they may effect a suitable passage over the former channel, causing no unnecessary damage thereby.⁴ If a break in a dam is permitted to remain without repair, and the water in the millpond is thereby so reduced as to make it difficult or impossible to pass logs through a chute in the dam, the owner of logs floating down the stream to market may pass them through a new channel created by the break, doing no unnecessary damage.⁵ In Maine a stream which is only

¹ *Erie v. Canfield*, 27 Mich. 479; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Attorney General v. Evert Booming Co.*, 34 Mich. 462; *Newbold v. Mead*, 57 Penn. St. 487; *Enos v. Hamilton*, 27 Wis. 256; *Bassett v. Carleton*, 32 Maine, 553. See *Barnes v. Heath*, 58 N. H. 196; *State v. Gilmanston*, 14 N. H. 467, 479; *Sewall's Fall Bridge v. Fisk*, 23 N. H. 171; *George v. Fisk*, 32 N. H. 32, 43; *Thompson v. Androscoggin River Co.*, 54 N. H. 545; 58 N. H. 108; *Lancey v. Clifford*, 54 Maine, 487; *Brown v. Chadbourne*, 31 Maine, 9; *Knox v. Chaloner*, 42 Maine, 150, 157; *Veazie v. Dwinel*, 50 Maine, 479, 487; *Davis v. Winslow*, 51 Maine, 289; *Parks v. Morse*, 52 Maine, 260; *Wood v. Hustis*, 17 Wis. 416; *Cobb v. Smith*, 16 Wis. 661. In *Harrington v. Edwards*, 17 Wis. 586, held that raftsmen cannot establish a custom among themselves which impairs the rights of the riparian proprietors.

² *Morgan v. King*, 18 Barb. 277.

³ *Dwinel v. Barnard*, 28 Maine, 554.

⁴ *Dwinel v. Veazie*, 44 Maine, 167.

⁵ *Whistler v. Wilkinson*, 22 Wis. 572.

capable of floating rafts or logs, is "not navigable" within the meaning of the mill act of 1841, which authorizes the erection and maintenance of water mills and dams upon and across any unnavigable stream.¹ In Pennsylvania, where the principal fresh-water rivers are held to be public property like tide waters, fresh streams which are merely floatable and have been included in the warrants and surveys of the land office as part of the public lands, belong to the riparian owners *usque ad flum aquae*, subject to the public right of passage.² A similar rule prevails in Tennessee.³

§ 111. When a river is capable of navigation in different parts of its course, but, by reason of rocks, sand-bars and other obstructions, does not admit of continuous navigation,⁴ the public may pass and repass in those parts of the river which are navigable.⁵ If the natural navigation of the river affords a channel for useful commerce, it continues to be navigable and open to the public, although the natural barriers which render its navigation difficult are afterwards removed by artificial means, such as locks, canals, and dams.⁶

¹ *Veazie v. Dwinel*, 50 Maine, 479, 483; *Stetson v. Bangor*, 60 Maine, 313. See, also, *State v. Cullum*, 2 Speers (S. C.) 581; *State v. Hickson*, 5 Rich. (S. C.) 447; *Witt v. Jefcoat*, 10 Id. 389; *Wood v. Hustis*, 17 Wis. 416; *Waller v. McConnell*, 19 Wis. 417; *Crosby v. Smith*, Id. 449; *Cobb v. Smith*, 16 Wis. 661. In proceedings under a statute to obtain the right to dam an unnavigable stream, it is presumed, on appeal, in the absence of evidence to the contrary, that it appeared to the court below that the stream was not navigable. *Siman v. Rhodes*, 24 Minn. 25.

² *Coovert v. O'Conner*, 8 Watts, 477; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194.

³ *Stuart v. Clark*, 2 Swan, 9; *Sigler v. State*, 7 Baxter, 493.

⁴ *The Montello*, 20 Wall. 430; 11 Wall. 411; *The Daniel Ball*, 10 Wall. 557; *Spooner v. McConnell*, 1 McLean, 337, 350; *Jolly v. Terre Haute*

Bridge Co., 6 McLean, 237; *Brown v. Chadbourne*, 31 Maine, 9, 23, 25; *Treat v. Lord*, 42 Maine, 552; *People v. Canal Appraisers*, 33 N. Y. 461; *Monagan v. King*, 35 N. Y. 459; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Cox v. State*, 3 Blackf. 193; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *Hickok v. Hine*, 23 Ohio St. 527; *Rowe v. Granite Bridge Co.*, 23 Pick. 346; *Attorney General v. Woods*, 108 Mass. 436; *Illinois River Packet Co. v. Peoria Bridge Co.*, 38 Ill. 467; *Harrington v. Edwards*, 17 Wis. 586.

⁵ *Ibid.*; *Brown v. Chadbourne*, 31 Maine, 9, 23, 25. An accidental or intentional obstruction, which was not in the stream in its natural condition, does not take away its character as a highway. *Treat v. Lord*, 42 Maine, 552; *Brown v. Black*, 43 Maine, 443.

⁶ *Ibid.*; *The Montello*, 20 Wall. 430.

If the navigation of a river which was originally navigable in fact, to a greater or less extent, be improved by the act of the riparian owners in deepening the channel, the public have the right to use it for all purposes to which it is suited in its improved condition.¹ But if, being originally unnavigable, it is made navigable by the riparian proprietors, the public right does not attach.² The legislature cannot, by means of dams or otherwise, make an unnavigable stream public and navigable, or deprive the riparian owners of their right to use the water, without affording them compensation;³ nor, if the legislature declares a stream to be navigable, does it divest the property previously acquired in its bed under a patent from the State.⁴ But such owners may dedicate to the public use highways by water as well as by land, and if, when dedicated, they are not passable, the public may make them so.⁵ The mere user by the public of a private stream for floating logs at irregular intervals, neither interrupted nor acquiesced in, is not evidence of a dedication to the public.⁶ A

¹ The *Montello*, 20 Wall. 430; *Holden v. Robinson Co.*, 65 Maine, 215; *Toothaker v. Winslow*, 61 Maine, 123; *Wadsworth v. Smith*, 11 Maine, 278; *Volk v. Eldred*, 23 Wis. 410; *Cates v. Wadlington*, 1 McCord (S. C.) 580.

² *Hale, De Jure Maris*, c. 3; *Wadsworth v. Smith*, 11 Maine, 278; *Cro. Car.* 132; *Cowper*, 47; *Holden v. Robinson Co.*, 65 Maine, 215.

³ *Ibid.*; *Walker v. Board of Public Works*, 16 Ohio, 540; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Moor v. Veazie*, 32 Maine, 343; 31 Maine, 360; *State v. Cullum*, 2 Speers (S. C.) 581; *Binney's Case*, 2 Bland, 158; *State v. Pool*, 74 N. C. 402, 407; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194; *Morgan v. King*, 35 N. Y. 454; 18 Barb. 277; 30 Barb. 9; *Cates v. Wadlington*, 1 McCord (S. C.) 585; *Wilson v. Smith*, 10 Wend. 324; *Partridge v. Eaton*, 3 Hun, 533; 5 S. C.

625; *White Deer Creek Co. v. Sassamen*, 67 Penn. St. 415; *State v. Glen*, 7 Jones, 321. Legislative enactments relating to navigable streams extend to those afterwards declared by the legislature to be highways. *Walker v. Board of Public Works*, 16 Ohio, 540; *Brown v. Commonwealth*, 3 Serg. & R. 273; *State v. Cullum*, 2 Speers (S. C.) 581; *People v. Gutchess*, 48 Barb. 656. A statute which declares a stream to be a public highway for the passage of boats and rafts embraces logs not fastened together. *Dedrick v. Wood*, 15 Penn. St. 9.

⁴ *Covert v. O'Connor*, 8 Watts, 447; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194; *People v. Gutchess*, 48 Barb. 656.

⁵ *Yates v. Judd*, 18 Wis. 118, 128; *Arnold v. Elmore*, 16 Wis. 509; *Mariner v. Schulte*, 13 Wis. 692.

⁶ *Curtis v. Keesler*, 14 Barb. 511.

navigable stream may be useful as a highway when covered with ice. In Maine it is held that the public right of passage is not suspended or changed in winter by the fact that it cannot be used with boats, and that those who cut holes in the ice upon or near a winter road along the shore of a navigable river which has been used for twenty years, are liable to those who, without being themselves at fault, suffer injury or loss thereby.¹

§ 112. By the common-law rule, a river is *prima facie* navigable only as far as the tide ebbs and flows in it, and, in case of doubt, the burden of proof is upon those who allege navigability above that point.² But the courts take notice of those characteristics of streams which are matters of general history or common knowledge,³ as that the tide ebbs and flows in such well-known rivers as the Thames and Mersey.⁴ In Indiana judicial notice is taken of the course of the Ohio River,⁵ of the position of the falls of the Ohio,⁶ and of the navigability of streams.⁷ In Wisconsin the court has taken notice of the fact that the capacity of many of the smaller streams in that State to float logs and lumber to market has been increased by dams.⁸ And generally a stream is presumably navigable, when it is subject to the commercial power of Congress and that power has been exerted over it,⁹ or when the river remains public property and does not pass to the riparian proprietors.¹⁰ So judicial notice has been taken of the fact that no part of a river lies within the corporate limits of a city.¹¹ If the character

¹ French v. Camp, 18 Maine, 433; State v. Wilson, 42 Maine, 9. See Roxbury v. Stoddard, 7 Allen, 158.

² Rhodes v. Otis, 33 Ala. 578; Bowman v. Wathen, 2 McLean, 376; Adams v. Pease, 2 Conn. 483.

³ Bittle v. Stuart, 34 Ark. 224; Thompson v. Androscoggin Co., 54 N. H. 545, 548.

⁴ Whitney v. Sauche, 11 La. Ann. 432; McIntosh v. Gastenhofer, 2 Rob. (La.) 403.

⁵ Hays v. State, 8 Ind. 425.

⁶ Cash v. Auditor, 7 Ind. 227.

⁷ Neaderhouser v. State, 28 Ind. 257; Ross v. Faust, 54 Ind. 471; Mossman v. Forrest, 27 Ind. 233.

⁸ Tewksbury v. Schulenberg, 41 Wis. 584, 593; Siegbert v. Stiles, 39 Wis. 533.

⁹ Pennsylvania v. Wheeling Bridge Co., 13 How. 518, 556, 564; Hodgman v. St. Paul Railway Co., 23 Minn. 153, 160.

¹⁰ Wood v. Fowler, 26 Kansas, 682.

¹¹ Montgomery v. Montgomery Plankroad Co., 31 Ala. 76.

of the stream is not defined in any public statute, or in a private statute introduced in evidence, and it is not of such notoriety as to be generally understood, it cannot be known judicially that it is navigable.¹ If streams flowing through the territory which was under the land system of the United States are not meandered, the presumption is that they are not navigable.²

§ 113. The owner of a wharf is bound to exercise due diligence to keep it safe for the uses for which it was made. If he permits persons to come there and to have access to and from vessels over the wharf, he is liable for injuries which they, being in the exercise of due care, sustain by reason of his negligence.³ His duty is the same as that which is imposed upon the keeper of an inn or store to keep the access to his premises, and the passages, rooms, and floors therein, safe for those who enter under the express or implied invitation of the owner.⁴ The true rule is, perhaps, even more stringent, the wharf owner, upon whose vigilance often depends the personal safety of many, being, it has been said, bound to the utmost care.⁵ He is not liable for latent defects, or

¹ *People v. Allen*, 42 N. Y. 378, 381; *New York Co. v. Brooklyn*, 71 N. Y. 580; *Leighy v. Ashland Lumbering Co.*, 49 Wis. 165; *Geise v. Green*, *Ibid.* 334; *Oelrich v. Gilman*, 31 Wis. 495; *Siman v. Rhodes*, 24 Minn. 25; *Waller v. McConnell*, 19 Wis. 417.

² *Clute v. Briggs*, 22 Wis. 607; *Jones v. Pettibone*, 22 Wis. 308; *Hubbard v. Bell*, 54 Ill. 110.

³ *Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236; *Macauley v. New York*, 67 N. Y. 602; *Swords v. Edgar*, 59 N. Y. 28; *Buckbee v. Brown*, 21 Wend. 110; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Railroad Co. v. Hanning*, 15 Wall. 649.

⁴ *Chapman v. Rothwell*, El. Bk. & El. 168; *Corby v. Hill*, 4 C. B. N. S. 556; *Collis v. Selden*, L. R. 3 C. P.

495; *Smith v. London Dock Co.*, L. R. 3 C. P. 326; *Sweeney v. Old Colony Railroad Co.*, 10 Allen, 368; *Elliott v. Pray*, *Ibid.* 378; *Knight v. Portland Railway Co.*, 56 Maine, 234; *Ackhert v. Lansing*, 59 N. Y. 646; *Swords v. Edgar*, *Ibid.* 28; *Trim v. Vallejo St. Wharf Co.*, 7 Cal. 253; *Fennimore v. New Orleans*, 20 La. Ann. 124; *Philadelphia Railroad Co. v. Irwin*, 89 Penn. St. 71; *Buckingham v. Fisher*, 70 Ill. 121; *Grand Tower Co. v. Hawkins*, 72 Ill. 386; *Freer v. Cameron*, 4 Rich. (S. C.) 228; *Maenner v. Carroll*, 46 Md. 193; *Barrett v. Black*, 56 Maine, 498; *Pittsburg v. Grier*, 22 Penn. St. 54; *Campbell v. Portland Sugar Co.*, 62 Maine, 552; *Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia Iron Co.*, 99 Mass. 216.

⁵ *Ibid.*

for those which are caused by inevitable accident, such as the exceptional violence of the sea.¹ But in these cases he cannot escape liability if he does not make such examination and inspection as the construction, uses, and exposure of the wharf reasonably require;² and if he has knowledge of a defect which is not apparent to all,³ it is his duty, even before there is opportunity to repair, to close the wharf or to give proper notice of the danger.⁴ So long as the wharf is kept open, it amounts to a representation that it is safe to enter, and that due diligence has been used both in its construction and repair.⁵ This obligation rests upon the owner, not only in favor of those who compensate him for its use, or of those who contract with him therefor, but of all persons who enter rightfully upon the premises for the purposes of lawful business.⁶ It is not limited to persons who come upon the wharf to transact the business for which it is adapted, but extends to all who come there for legitimate purposes, as a customs officer whose duty is to prevent smug-

¹ *Wendell v. Baxter*, 12 Gray, 494; *Garrison v. New York*, 5 Bosw. (N. Y.) 497; *Wallace v. New York*, 2 Hilt. 440; 18 How. Pr. 169.

² *Ibid.* In *Hill Manuf. Co. v. Providence Steamship Co.*, 125 Mass. 292, it was held that upon the issue whether piers in New York were properly constructed, evidence that piers are similarly constructed elsewhere was rightly excluded.

³ See *Southcote v. Stanley*, 1 H. & N. 247; *Holmes v. North Eastern Railway Co.*, L. R. 4 Ex. 254; 6 Id. 123. It is contributory negligence to drive upon a pier, knowing that it is out of repair. *Clancy v. Byre*, 58 Barb. 449; 56 N. Y. 129; *Durkin v. Troy*, 61 Barb. 437.

⁴ *Gibbs v. Liverpool Docks*, 3 H. & N. 164, 176; s. c. *nom.* *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687; L. R. 1 H. L. 93; *Mersey Docks v. Penhallow*, 7 H. & N. 329; *Indemaure v. Dames*, L. R. 2 C. P. 311; 1 *Ibid.*, 274; *Smith v. London Docks Co.*, L. R. 3 C. P. 326; *Thompson v. North*

Eastern Railway Co., 2 B. & S. 106; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; 3 N. & P. 523; 3 P. & D. 162; *Lyme Regis v. Henley*, 3 B. & Ad. 92; *Railroad Co. v. Hanning*, 15 Wall. 649; *Pittsburgh v. Grier*, 22 Penn. St. 54.

⁵ *Ibid.*

⁶ *Southcote v. Stanley*, 1 H. & N. 247; *White v. France*, 2 C. P. D. 308; *Holmes v. North Eastern Railway Co.*, 38 L. J. Ex. 161; *Balch v. Smith*, 7 H. & N. 741; *Collett v. London Railroad*, 16 Q. B. 984; *Indemaure v. Dames*, L. R. 2 C. P. 311; 1 *Ibid.* 274; *Wendell v. Baxter*, 12 Gray, 494; *Davis v. Central Congregational Society*, 129 Mass. 367, 371; *Gilbert v. Nagle*, 118 Mass. 278; *Severy v. Nickerson*, 120 Mass. 306; *Sweeny v. Old Colony Railroad Co.*, 10 Allen, 368; *Elliott v. Pray*, 10 Allen, 378; *Zoebis v. Tarbell*, 10 Allen, 385; *Baker v. Byrne*, 58 Barb. 438; *Campbell v. Portland Sugar Co.*, 62 Maine, 552.

gling;¹ the agents of the post-office;² the vendors of goods to those upon a vessel lying the dock;³ hack-men who are awaiting passengers;⁴ and those who come to make inquiries.⁵ The occupant is primarily chargeable with the duty to repair, and is liable by reason of his occupancy, without proof of title.⁶ The lessor of a wharf who reserves rent is also liable for injuries caused by defects which existed when the tenant entered, although the latter may have covenanted to repair.⁷ But the lessor is not liable when the premises become defective after they have passed from his control,⁸ or in consequence of obstructions placed there by third persons, of which he has no notice, express or implied.⁹ Where premises may cause injury to the public from want of repair, the owner's responsibility to keep them in proper condition

¹ *Low v. Grand Trunk Railway Co.*, 72 Maine, 313.

² *Collett v. London & North-western Railway Co.*, 16 Q. B. 984; *Wendell v. Baxter*, 12 Gray, 494.

³ *Smith v. London & St. Catherine Docks Co.*, L. R. 3 C. P. 326.

⁴ *Tobin v. Portland Railroad Co.*, 59 Maine, 183.

⁵ *Stratton v. Staples*, 59 Maine, 95.

⁶ *Cannavan v. Conklin*, 1 Daly, 509; 1 Abb. Pr. N. S. 271.

⁷ *Swords v. Edgar*, 59 N. Y. 28; 44 How. Pr. 139; 1 Sup. Ct. 23; *Clancy v. Byre*, 56 N. Y. 129; 65 Barb. 344; *Walsh v. Mead*, 8 Hun, 387; *Thompson v. Mayor*, 11 N. Y. 115; *Heaney v. Heeney*, 2 Denio, 625; *Irvine v. Wood*, 51 N. Y. 224; 4 Rob. 138; 5 Rob. 482; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Leary v. Woodruff*, 4 Hun, 99; *Bogart v. Haight*, 20 Barb. 251; *Vanderwater v. New York*, 2 Sandf. 258; *Murray v. Sharp*, 1 Bosw. 539; *Stevens v. Rhineland*, 5 Rob. 285; *Taylor v. New York*, 4 E. D. Smith, 559; *Shindlebeck v. Moon*, 32 Ohio St. 264, 273. See *Nash v. Minneapolis Mill Co.*, 24 Minn. 501; *House v. Metcalf*, 27 Conn. 640; *Owings v. Jones*, 9 Md. 108; *Leonard v. Storer*, 115 Mass.

86; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, L. R. 10 C. P. 658; *Rosewell v. Prior*, 12 Mod. 635; 2 Salk. 459; *Rex v. Pedly*, 1 Ad. & El. 822; *Todd v. Flight*, 9 C. B. N. S. 377; *White v. Phillips*, 12 W. R. 85; 15 C. B. N. S. 245. If the lessee of a wharf covenants to make any repairs required by the proper municipal authorities for the safety or convenience of vessels lying at the wharf, the covenant is not broken by neglect to make repairs ordered by such authorities for the purpose of preventing injury to the river. *Myers v. Myrrell*, 57 Ga. 516. Proof of a right to unload a vessel at a wharf does not establish title to the wharf, but the easement of unloading is consistent with title in another. *Kipp v. Den*, 24 N. J. L. 854.

⁸ *Ibid.*; *Clancy v. Byre*, 56 N. Y. 129; 58 Barb. 449; *Albany v. Cunliff*, 2 Comst. 165; *Walsh v. Mead*, 8 Hun, 387; *Radway v. Briggs*, 37 N. Y. 256; 35 How. Pr. 422; *Cannavan v. Conklin*, 1 Daly, 509; *Owings v. Jones*, 9 Md. 108.

⁹ *Seaman v. New York*, 3 Daly, 147; *Griffin v. Mayor*, 9 N. Y. 456; *Barton v. Syracuse*, 36 N. Y. 54; *Tarry v. Ashton*, 1 Q. B. D. 314.

is not lessened by the employment of a competent person to repair them, if they are not repaired, and injury is caused in consequence.

§ 114. These rules apply when the owner or occupant of a wharf, dock, or canal expressly or impliedly invites vessels to enter. In *Carleton v. Franconia Iron & Steel Co.*,¹ it appeared that the defendants procured the plaintiffs to bring their vessel to the defendants' wharf for the purpose of discharging a cargo of iron, and that, while lying at the wharf, the vessel settled with the ebb of the tide and was injured by a rock, of the existence and position of which the defendants had long known, but of which the plaintiffs and their employees had no notice. It did not appear that the defendants owned the soil of the dock in which the rock was imbedded, but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to the wharf. The court said:² "It is immaterial in this case whether the danger had been created or increased by the excavation made by the defendants, or had always existed, if they, knowing of its existence, neglected to remove it or to warn those transacting business with them against it. Even if the wharf was not public, but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not

¹ 99 Mass. 216; citing *Sweeny v. Old Colony Railroad Co.*, 10 Allen, 368; *Allen v. Pray*, Ibid. 378; *Wendell v. Baxter*, 12 Gray, 494; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; 3 N. & P. 523; 3 P. & D. 162; *Gibbs v. Liverpool Docks*, 3 H. & N. 164; s. c. *nom. Mersey Docks v. Gibbs*, 11 H. L. Cas. 687, and L. R. 1 H. L. 93; *Indemaur v. Dames*, L. R. 1 C. P. 274; 2 Ibid. 311; *Thompson v. North Eastern Railway Co.*, 2 B. & S. 106. See, also, *Curling v. Wood*, 16 M. & W. 628; *White v. Phillips*, 15 C. B. N. S. 245; *Smith v. London Docks Co.*, L. R. 3 C. P. 326; *Barrett v. Black*, 56 Maine, 498; *Oliver v. Worcester*, 102 Mass. 489; *Sawyer v. Oakman*, 7 Blatch. 290; 1 Lowell, 134; *Nelson v. Phoenix Chemical Works*, 7 Ben. 37; *Mason v. Rhinelander*, 8 Ben. 163; *Philadelphia Railroad Co. v. Philadelphia Steamboat Co.*, 23 How. 209; *Smith v. Comptroller*, 18 Wend. 659; *Seaman v. New York*, 80 N. Y. 239; *Exchange Fire Ins. Co. v. Delaware Canal Co.*, 10 Bosw. 180; *Weitner v. Delaware Canal Co.*, 4 Rob. 234; *Johnson v. Belden*, 47 N. Y. 130; 2 Lans. 433; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Borden Mining Co. v. Barry*, 17 Md. 419. The master of a canal boat, who attempts to pass a lock, and knows that the gates are out of repair, is not, because of such knowledge, guilty of contributory negligence. *Johnson v. Belden*, *supra*.

² 99 Mass. 219.

created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe. This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the travelled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway." In *Nickerson v. Tirrell*,¹ the evidence was conflicting as to the condition of the dock, in which other vessels, both larger and smaller than the plaintiffs' had safely discharged, and as to the cause of injury to the plaintiffs' vessel, the bottom of which was broader than many vessels of its size and class. The case was submitted to the jury upon the issue whether the injury was attributable to want of care on the part of the defendant or of the master of the vessel. Morton, J., in delivering the opinion of the court, upon exceptions alleged by the defendant, thus states the rules applicable to this class of cases: "The owner or occupant of a dock is liable in damages to a person who, by his invitation express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care, if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence, and liable to the person who,

¹ 127 Mass. 236.

using due care, is injured thereby." In *Byrne v. Chicago*¹ it was held reasonable to require the owners of a canal to draw off the water periodically for the purpose of inspecting the bed, and such owners were held not liable for injuries to a boat which struck upon a rock in the canal, if it was deposited there by a land-slide, and the owners were not otherwise at fault. A contractor who has agreed to keep a canal free from obstruction to the navigation, is liable for negligently permitting obstructions to continue, and such cause of action is assignable.² A canal corporation is not liable in a private action for failure to construct its canal according to its charter, except upon the ground of special peculiar dam-

¹ 80 Ill. 195; *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223; *Pennsylvania Canal Co. v. Burd*, 90 Penn. St. 281; *Exchange Fire Ins. Co. v. Delaware Canal Co.*, 10 Bosworth, 180; *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90; *Wilson v. Susquehanna Turnpike Co.*, 21 Barb, 68; *Hicks v. Dorn*, 42 N. Y. 47; 54 Barb. 172; 1 Lans. 81; *Mullen v. St. John*, 57 N. Y. 567; *Lane v. Salter*, 4 Robt. 239. In the above case of *Pennsylvania Canal Co. v. Burd*, in which a canal boat was injured by a sunken log, Sterrett, J., said: "An injury resulting from an unknown obstruction, which could not be guarded against, without the exercise of extraordinary or unreasonable care, must be considered an accident for which no one is specially to blame, and for which the company is not liable. It would be unreasonable to require a canal company to sound and drag the whole length of its canal continually, to ascertain what obstructions might lie at the bottom, or to keep guards along the banks, to prevent the commission of injuries by careless or designing persons. But it is bound, annually at least, when the water is out of the canal, to inspect the bed and remove obstructions." When a canal company receiving tolls induces a boat to enter the canal, a promise is im-

plied to let it through in a reasonable time. *Muir v. Louisville Canal Co.*, 8 Dana, 161.

² *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Robinson v. Chamberlain*, 34 N. Y. 389. If one conveys a mill, dam, and slip, reserving the right to slip his own logs, free of toll, it is a personal right and not assignable. *Wadsworth v. Smith*, 11 Maine, 278. By a written agreement, the defendants were to repair and occupy the plaintiff's canal, to collect and account for the tolls on all merchandize, including their own, and, "after deducting all costs, expenses, and charges for repairing and running said canal," were to pay the net profits to the owner. The agreement provided in a subsequent clause that the defendants should account for and pay over "the whole of said receipts, after deducting the expenditures in making said repairs." The defendants were held entitled to retain from the tolls received suitable compensation for their supervision of the canal and its repair, though not expressly stipulated in the contract. *Dyer v. Fitch*, 63 Maine, 170. The defendant, when sued for dockage and wharfage, may recoup his damages by reason of the wharf being out of repair. *Buckbee v. Brown*, 21 Wend. 110; *Albany v. Trowbridge*, 7 Hill, 429; 5 Hill, 71.

ages;¹ but if such corporation neglects to keep the canal free and clear from obstructions as required by its charter, it is liable to the owner of a raft which is thereby grounded and injured.²

§ 115. Corporations and public trustees, empowered to improve the navigation of streams, or to construct canals, docks, wharves, water-works, or bridges, may be liable, independently of statute, for a neglect of duty which causes injury to individuals from whom toll is demandable.³ In *Mersey Docks v. Gibbs*,⁴ it appeared that the trustees of the docks in Liverpool were incorporated by act of parliament for the construction and maintenance of docks and warehouses for the public use, with authority to collect tolls therefor, and that these tolls were to be applied exclusively to the maintenance of the docks and warehouses, and to the pay-

¹ *Quincy Canal v. Newcomb*, 7 Met. 276, 284.

² *Riddle v. Locks & Canals*, 7 Mass. 169.

³ *Harrison v. Great Northern Railway Co.*, 3 H. & C. 231; *Manley v. St. Helen's Canal Co.*, 2 H. & C. 840; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; *John v. Bacon*, L. R. 5 C. P. 437; *Bayley v. Wolverhampton Water Works Co.*, 6 H. & N. 241; *Smith v. London Docks Co.*, L. R. 3 C. P. 326; *Dunn v. Birmingham Canal Co.*, L. R. 8 Q. B. 42; *Rex v. Kent*, 13 East, 220; *Newark Plank Road Co. v. Elmer*, 1 Stock. 755; 4 Hal. Ch. 586; *Gifford v. New Jersey Railroad Co.*, 2 Id. 177; *Attorney General v. New Jersey Railroad Co.*, 2 Green Ch. 136; *Allen v. Monmouth Co.*, 2 Beas. 68; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Prescott v. Duquesne*, 48 Penn. St. 118; *Pennsylvania Railroad Co. v. Patterson*, 73 Penn. St. 491; *Pennsylvania Canal Co. v. Graham*, 63 Penn. St. 290; *Hill v. Boston*, 122 Mass.; *Yale v. Hampden Turnpike Co.*, 18 Pick. 357; *Heacock v. Sherman*, 14 Wend. 58; *Albany v. Cunliff*, 2 N. Y. 165; *Radway v. Briggs*, 37 N. Y. 256; *Stack v. Bangs*, 6 Lans.

262; *Humphreys v. Armstrong*, 56 Penn. St. 204, 209; *Steele v. Western Navigation Co.*, 2 Johns. 283; *Schuylkill Navigation Co. v. McDonough*, 33 Penn. St. 73; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Adsit v. Brady*, 4 Hill (N. Y.) 630; *Shepherd v. Lincoln*, 17 Wend. 250.

⁴ 11 H. L. Cas. 687; L. R. 1 H. L. 93; 7 H. & N. 329; 3 Id. 164; 1 Id. 439; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; *Mersey Docks v. Cameron*, 11 H. L. Cas. 443; *Coe v. Wise*, L. R. 1 Q. B. 711; 5 B. & S. 440; 7 Id. 831; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Foreman v. Canterbury*, 40 L. J. (Q. B.) 138; *Shoebottom v. Egerton*, 18 L. T. n. s. 889; *Walker v. Goe*, 4 H. & N. 350; *Witherly v. Regent's Canal Co.*, 3 F. & F. 61; 12 C. B. n. s. 2; *Thompson v. North-eastern Railway Co.*, 2 B. & S. 106; *Grant v. Sligo Harbour Commissioners*, Ir. R. 11 C. L. 190; *Itchin v. Southampton*, 8 E. & B. 301; *Ward v. Lee*, 7 E. & B. 426; *Clothier v. Webster*, 12 C. B. n. s. 790; *Ruck v. Williams*, 3 H. & N. 308; *Whitehouse v. Fellows*, 10 C. B. n. s. 765; *Brownlow v. Metropolitan Board*, 13 C. B. n. s. 768; 16 Id. 546.

ment of the indebtedness incurred in their construction; and it was held by the House of Lords that the trustees were liable to the owner of a vessel, which was injured in entering one of the docks, by striking upon a bank of mud which their servants and agents had negligently permitted to accumulate at the entrance. In *Winch v. Conservators of the Thames*,¹ the defendants were held liable for the non-repair of a towing path adjoining the river Thames, the doctrine sustained by the majority of the court of Exchequer Chamber being that the defendants, so long as they kept the towing path open and took toll for its use, were under an obligation to those whom they invited to use it, to take reasonable care that the towing path was in such condition as not to expose those using it to undue danger, and that there was no distinction in this respect between the natural and artificial parts of the towing path. But where the trustees or conservators of a river, who were not owners of the river or of the navigation therein, but were an unpaid body of trustees, appointed for public purposes in aid of the common-law right of navigating an ancient highway, were authorized to remove all obstructions and impediments to the navigation *at their discretion*, they were held not liable for injuries sustained by a vessel which struck upon submerged piles in the bed of the river.² So, in the absence of negligence, a corporation empowered by a special act to improve the navigation of a river, and to collect tolls for the purpose of defraying the expense, is not liable at law for injury to the adjoining lands caused by an overflow of the water in consequence of staunches which it has erected in the river in aid of the navigation, combined with the natural growth of weeds and the accumulation of silt against the staunches,³ since the duties of a navigation company which does not own the soil are confined, in the absence of an express enactment upon

¹ L. R. 9 C B. 378; L. R. 7 Q. B. 458.

² *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116; *York Railway Co. v. Reg.*, 1 El. & Bk. 858; *Great Western Railway Co. v. Reg.* 1 El. & Bk. 874.

See *Grote v. Chester Railway Co.*, 2 Exch. 251; *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 316.

³ *Cracknell v. Thetford*, L. R. 4 C. P. 629. It is a matter for *compensation*, and not for damages at law. See *post*, § 250.

the subject, to matters relating to the navigation.¹ The liability, when it exists, depends upon the neglect of duty towards persons who, being within the scope of the benefit intended by the statute, are damaged by such neglect.²

§ 116. *Quasi* corporations, such as counties and municipal corporations, created by the legislature for public purposes, are subject to indictment at common law for the neglect of a public duty imposed upon them, but are not liable to a private action for such neglect, unless such action is given by statute, or the liability arises by prescription, or unless they hold and deal with property for their own emolument, and receive rents or tolls therefrom like a private owner.³

¹ *Ibid.*; *Parrett Navigation Co. v. Robins*, 10 M. & W. 593.

² *Ibid.*; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 213; *Manley v. St. Helen's Canal*, 2 H. & N. 840; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Forbes v. Lee Conservancy Board*, 4 Ex. 116; *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169. Corporate bodies, or individuals, when authorized to perform an act for others which will benefit themselves, such as the construction of a toll-bridge, are bound to repair, though the public use the structure. *Rex v. West Riding*, 2 East, 342; *Rex v. Kent*, 13 East, 220; *Rex v. Lindsay*, 14 East, 37; *Rex v. Somerset*, 16 East, 305; *Rex v. Oxfordshire*, 16 East, 223; *Reg. v. Kerrison*, 3 M. & S. 526; *Manley v. St. Helen's Canal Co.*, 2 H. & N. 804; *Reg. v. Brecon*, 15 Q. B. 813; *Nicholl v. Allen*, 1 B. & S. 934; *Wiggins v. Boddington*, 3 C & P. 544; *Reg. v. Ely*, 4 New Sess. Cas. 222. See *Cutler v. Howard*, 9 Wis. 309; *County Commissioners v. Duckett*, 20 Md. 468; *Hill v. Boston*, 122 Mass. 344; *Freedom v. Weed*, 40 Maine, 383; *Tift v. Jones*, 52 Ga. 538. But if they act solely for the benefit of the public, or if the particular liability is, by statute, prescription or otherwise, shifted upon the public, they are not

liable if they fail to repair. *Reg. v. Southampton*, 18 Q. B. 841; *Rex v. Oxfordshire*, 16 East, 223; *Rex v. Derbyshire*, 2 Q. B. 745; *Rex v. Whitchney*, 3 Ad. & El. 69; *Rex v. Trafford*, 1 B. & Ad. 874; *Rex v. Devonshire*, 5 B. & Ad. 383; *Reg. v. Gloucestershire*, 2 C. & M. 506; *Reg. v. Southampton*, 18 Q. B. 841; *Sampson v. Goochland Justices*, 5 Gratt. 241; *Rex v. Hendon*, 4 B. & Ad. 628; *Rex v. Oswestry*, 6 M. & S. 361; *Rex v. Ecclesfield*, 1 B. & A. 348; *Rex v. Stratford-on-Avon*, 14 East, 348; *Rex v. Lincoln*, 8 Ad. & El. 65; *Rex v. Surrey*, 2 C. & M. 455; *Beaver v. Manchester*, 8 E. & B. 44; *Reg. v. Southampton*, 18 Q. B. 841; *Rex v. Oxfordshire*, 4 B. & S. 194; *Nicholl v. Allen*, 1 B. & S. 934; *Reg. v. Commissioners*, 10 L. T. n. s. 375; *Rex v. Yorkshire*, 5 Burr. 2594; 2 Wm. Bk. 685; *Flynn v. Canton Co.*, 40 Md. 312; *Sayre v. North-western Turnpike Road*, 10 Leigh, 454; *Swineford v. Franklin Co.*, 6 Mo. App. 39; *Maximilian v. Mayor*, 62 N. Y. 160; *Coulson & Forbes on Waters*, 519; *Orcutt v. Kittery Point Bridge Co.*, 53 Maine, 500. The owner of a toll-bridge is not liable as a common carrier, but is only bound to proper diligence in keeping the bridge in repair. *Grigsby v. Chapel*, 5 Rich. (S. C.) 444.

³ *Russell v. Men of Devon*, 2 T. R.

Under the last exception, a city which has possession and exclusive control of a public wharf or dock, and receives toll for its use, is liable to an individual who is injured upon the wharf, or whose vessel is damaged, in consequence of non-repair.¹ Upon the ground of prescription, a municipal corporation has been held liable to a person who lost his navigation because of its neglect to repair and cleanse a tide-water creek,² and for the same reason it may be liable to a private action for damages caused by its neglect to repair sea-walls.³ A city which, being under no legal obligation to remove obstructions in a navigable river, attempts so to do, but abandons the work without changing the position of an obstruction which afterwards causes injury to a vessel, is not liable therefor.⁴

667; *Hill v. Boston*, 122 Mass. 344; *Barnes v. District of Columbia*, 91 U. S. 540, 551; *Dillon, Mun. Corp. c. 23*; *Gordon v. Taunton*, 126 Mass. 349; *Riddle v. Locks & Canals*, 7 Mass. 169; *Mower v. Leicester*, 9 Mass. 247; *Finch v. Board of Education*, 30 Ohio St. 37; *Pray v. Jersey City*, 32 N. J. L. 394; *Rowe v. Portsmouth*, 56 N. H. 291; *Eastman v. Meredith*, 36 N. H. 284; *Detroit v. Blackeby*, 21 Mich. 84; *Rapho v. Moore*, 68 Penn. St. 404; *Baltimore v. Marriott*, 9 Md. 160, 175; *Cooper v. Athens*, 53 Ga. 638; *Aldrich v. Tripp*, 11 R. I. 145. See *Waltham v. Kemper*, 55 Ill. 346; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 431; *Richmond v. Long*, 17 Gratt. 375; *Transportation Co. v. Chicago*, 99 U. S. 635; 7 Biss. 45; *Nugent v. Levee Commissioners*, 58 Miss. 197.

¹ *Pittsburgh v. Grier*, 22 Penn. St. 54; *Pittsburg Railway v. Gilleland*, 56 Penn. St. 445, 451; *Winpenny v. Philadelphia*, 65 Penn. St. 135, 140; *Philadelphia v. Gilmartin*, 71 Penn. St. 140, 159; *Snyder v. Philadelphia*, 78 Penn. St. 23; *Hey v. Philadelphia*, 81 Penn. St. 44, 51; *Maxwell v. The City*, 7 Phila. 137; *Hill v. Boston*, 122 Mass. 344, 376; *Oliver v. Worcester*,

102 Mass. 489; *Aldrich v. Tripp*, 11 R. I. 141; *Radway v. Briggs*, 37 N. Y. 256; *Kennedy v. New York*, 73 N. Y. 365; *Shinkle v. Covington*, 1 Bush, 617; *Memphis v. Kimbrough*, 12 Heisk. 133; *Petersburg v. Applegarth*, 28 Gratt. 321; *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *Jeffersonville v. The John Shallcross*, 35 Ind. 19; *Macauley v. New York*, 67 N. Y. 602; *Moody v. New York*, 43 Barb. 282; *Taylor v. New York*, 4 E. D. Smith, 559; *McGuinness v. New York*, 52 How. Pr. 450; *Seaman v. New York*, 3 Daly, 147. An agreement by a municipal corporation to let a repairing dock, which it owns, but of which it retains the control and possession, is not an agreement as to an interest in land, and if the admission of ships into the dock is a matter of frequent ordinary occurrence, the agreement need not be under the corporate seal. *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

² *Lynn v. Turner, Cowper*, 86.

³ *Henly v. Lyme*, 5 Bing. 91; 3 Mo. & P. 278; 3 B. & Ad. 77; 2 Cl. & Fin. 331; 8 Bligh, N. R. 690; 1 Bing. N. C. 222; 1 Scott, 29; *Hill v. Boston*, 122 Mass. 344, 348, 360.

⁴ *Goodrich v. Chicago*, 4 Biss. 18.

§ 117. Municipal corporations cannot engage in works of internal improvement, such as the construction of harbors, canals, etc., and loan their credit in aid thereof without special authority from the legislature.¹ They have been thought not liable for acts which are *ultra vires*, as by erecting an embankment in excess of their powers which turns a stream upon the plaintiff's lands.² They may be empowered by the legislature to pass ordinances for the preservation of their harbors and water channels and the regulation of vessels and wharves;³ to deepen and improve rivers, or to remove and prevent obstructions therein,⁴ or to subscribe for stock in a company organized for the purpose of improving the navigation of a river contiguous to the city or town, even when the improvements extend through several towns or counties.⁵ Special laws granting such powers and the right to levy taxes therefor are sustained by the courts, it is said, only when it is apparent that the works will be generally beneficial to the members of the corporation.⁶

¹ Hasbrouck v. Milwaukee, 13 Wis. 37; Miller v. Milwaukee, 14 Wis. 642; Oebicke v. Pittsburg, 5 Penn. L. J. Rep. 485; Anthony v. Adams, 1 Met. 284.

² Anthony v. Adams, 1 Met. 284; Wheeler v. Essex Public Road Board, 39 N. J. L. 291. But cf. *post*, § 260.

³ *Ibid.*; Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa, 185; Keokuk v. Keokuk Northern Line Packet Co., *Id.* 196; Culbertson v. The Southern Belle, Newb. 461; Soens v. Racine, 10 Wis. 271; Hasbrouck v. Milwaukee, 13 Wis. 37; 17 Wis. 266; 21 Wis. 217; New York v. Ryan, 2 E. D. Smith, 368; People v. Bryan, 46 Barb. 355; Ogdensburg v. Lyon, 7 Lans. 215; Ogdensburg v. Lovejoy, 2 S. C. 83; 10 Alb. L. J. 207; Brown v. Catlettsburg, 11 Bush, 435; Grant v. Davenport, 18 Iowa, 179; Philadelphia v. Field, 58 Penn. St. 320; New Orleans v. New Orleans Railroad Co., 27 La. Ann. 414; Ellerman v. McMains, 30 La. Ann. 190; Municipality No. 1 v. Kirk,

5 La. Ann. 34; Shepherd v. Third Municipality, 6 Rob. (La.) 349; Tourne v. Lee, 20 Martin, 549; Gregory v. Bridgeport, 41 Conn. 76; Horn v. People, 26 Mich. 221; Marshall v. Vicksburg, 15 Wall. 146; Bacon v. Mulford, 41 N. J. L. 59; Geiger v. Filor, 8 Fla. 325; Evansville v. Martin, 41 Ind. 145; Jeffersonville v. Louisville Ferry Co., 27 Ind. 100; Stevens v. Walker, 15 La. Ann. 577; Waddingham v. St. Louis, 14 Mo. 190; Murphy v. Montgomery, 11 Ala. 586.

⁴ Rochester v. Osborn, 5 Lans. 3; Winpenny v. Philadelphia, 65 Penn. St. 135.

⁵ Taylor v. Newbern, 2 Jones Eq. 141. As to the prohibiting the removal of sand by city ordinances, see Clason v. Milwaukee, 30 Wis. 316.

⁶ Alexander v. Milwaukee, 16 Wis. 247; Miller v. Milwaukee, 14 Wis. 642; Hasbrouck v. Milwaukee, 13 Wis. 37; 17 Wis. 266; 21 Wis. 217; State v. Hasbrouck, 25 Wis. 122; Reed v. Erie, 79 Penn. St. 346.

§ 118. The principle under which special assessments are made by municipal corporations upon city lots, for improvements in adjoining streets or highways by land, applies also to improvements in highways by water;¹ and such assessments may be authorized upon riparian proprietors whose estates are benefited thereby.² A municipal corporation is under no obligation at common law to keep adjacent waters safe for navigation.³ A city which is invested by its charter with "the general powers possessed by municipal corporations at common law," may build a breakwater for the purpose of protecting its streets and the buildings thereon from inundation, and a contract entered into for that purpose is binding on the city at large.⁴ When such a corporation is authorized by statute to maintain, repair, and regulate docks and wharves for the free use of the public, or of those who pay toll, it is in general a power which cannot be delegated.⁵ A wharf erected

¹ *Johnson v. Milwaukee*, 40 Wis. 315.

² *Hale v. Kenosha*, 29 Wis. 599; *Bond v. Kenosha*, 17 Wis. 284; *Buffalo Union Iron Works v. Buffalo*, 13 Abb. Pr. (N. S.) 141; *Wright v. Chicago*, 20 Ill. 252; *Elston v. Chicago*, 40 Ill. 514; *Goddin v. Crump*, 8 Leigh, 120; *Harrison Justices v. Holland*, 3 Gratt. 236; *Frederick v. Augusta*, 5 Ga. 561.

³ *Seaman v. New York*, 80 N. Y. 239; *ante*, § 98, n.

⁴ *Miller v. Milwaukee*, 14 Wis. 642; *Soens v. Racine*, 10 Wis. 271; *Roundtree v. Galveston*, 42 Texas, 613. The legislature may authorize a city to acquire the fee of land necessary for the construction of a breakwater. *Sweet v. Buffalo Railway Co.*, 79 N. Y. 203.

⁵ *Oakland v. Carpentier*, 13 Cal. 540; 21 Cal. 642; *People v. Broadway Wharf Co.*, 31 Cal. 33; *Lord v. Oconto*, 47 Wis. 386; *Matthews v. Alexandria*, 68 Mo. 115; *Mobile v. Moog*, 53 Ala. 561; *Illinois Canal Co. v. St. Louis*, 2 Dillon, 70; *Morris Co.*

v. Central Railroad Co., 16 N. J. Eq. 419. A city possessing the above authority may by ordinance prohibit the use of other wharves than those which it establishes. *Dubuque v. Stout*, 32 Iowa, 40, 47. The term "wharfage" includes a charge for landing goods at a natural landing as well as at an artificial wharf. *Sacramento v. New World*, 4 Cal. 41; *Sacramento v. Confidence*, Id. 45. As to what constitutes a wharf, see *Ibid.*; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196; *Fitchburg Railroad Co. v. Boston Railroad Co.*, 3 Cush. 58; *Stevens v. Rhinelander*, 5 Rob. (N. Y.) 285; *Decker v. Jaques*, 1 E. D. Smith, 80; *People v. Kelsey*, 38 Barb. 269; 14 Abb. Pr. 372. Authority conferred upon a city to build a free bridge, to be paid for by taxation, does not give it the right to establish a toll bridge. *Williams v. Davidson*, 43 Texas, 2. But if a city has authority under general laws to erect and maintain toll-bridges, it may change a toll-bridge into a free bridge, and *vice versa*. *Scott v. Des Moines*, 34 Iowa, 552.

by a city is presumably open to the public free of toll.¹ If the corporation is expressly authorized by statute or by its charter to maintain a public wharf, or a free bridge or ferry, it cannot exact toll;² nor being authorized by law to maintain a toll ferry, can it order the ferry to run without toll.³ When the privilege is granted of erecting a wharf or dock in a highway, it does not include the right to erect a warehouse;⁴ but a city which is invested with power to regulate and control its public wharves may authorize the erection of elevators thereon to facilitate the transshipment of grain.⁵

§ 119. Piers, landing places, docks, and wharves may be private, or they may be in their nature public, although the property may be in an individual owner.⁶ If a vessel is wrongfully moored to a private wharf, and the wharf-owner necessarily sets it adrift, he incurs no liability if, in consequence of his act, the vessel is stranded and lost.⁷ When wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest, and the wharfage must be reasonable.⁸ The keeping of such wharf is likened to the keeping of an inn, and all navigators have an implied license to moor their vessels to these wharves, an application to the owner for permission to do so not being necessary.⁹ If the owner of a

¹ *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa, 185; *Russell v. The Empire State*, Newb. 541; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275.

² *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Clark v. Des Moines*, 19 Iowa, 198; *Dively v. Cedar Falls*, 27 Iowa, 227; *Attorney General v. Boston*, 123 Mass. 460.

³ *Attorney General v. Boston*, 123 Mass. 460.

⁴ *Bingham v. Doane*, 9 Ohio, 165.

⁵ *Illinois Canal Co. v. St. Louis*, 2 Dillon, 70.

⁶ *Hale, De Portibus Maris*, c. 6; *Hargrave's Law Tracts*, 77, 78; *Munn v. Illinois*, 94 U. S. 113, 150; *Bolt v. Stennett*, 8 T. R. 606.

⁷ *Dutton v. Strong*, 1 Black, 23, 32; *Harrington v. Edwards*, 17 Wis. 586. The master of a vessel who wrongfully places the vessel behind a seawall, the exclusive right to use which, as a place of shelter, has been given to another, is liable for the loss of the latter vessel in a storm, if, upon request, he fails to remove his vessel. *Derry v. Flitner*, 118 Mass. 131.

⁸ *Hale, De Portibus Maris*, c. 6; *Allnut v. Inglis*, 12 East, 527; *The Wharf Case*, 3 Bland Ch. 361, 374; *Munn v. Illinois*, 94 U. S. 113, 151.

⁹ *Heaney v. Heaney*, 2 Denio, 625; *Swords v. Edgar*, 59 N. Y. 28.

public wharf sets adrift a vessel which is fastened thereto, and of which he has not requested the removal, he is liable for injury to the vessel occasioned thereby.¹ The question whether a wharf is public or private depends upon the purpose for which it was built, the uses to which it has been applied, the place where located, and the nature and character of the structure.² When a public highway is laid out to navigable waters, its termination is presumed to be a public landing as incident to the highway, but this presumption does not apply to any part of a highway which is laid out along the shore of such waters and follows the line of the shore, although it may come in contact with the water for a greater or less distance.³ The legislature, in the exercise of the power of eminent domain, may make a private wharf public in whole or in part,⁴ or dedicate a public wharf to such exclusive uses as in its judgment is proper.⁵ Where the legislature authorized a public wharf, landing, and road to be made on a plantation, the owner of which maintained a private wharf thereon, and directed payment to be made of the value of the premises taken for public use, as well as "damages generally to the same," it was held that the owner was not entitled to compensation for the loss of profits accruing from his private wharf.⁶

§ 120. Those who avail themselves of the use of a wharf are liable for wharfage, though the wharf is out of repair;⁷

¹ *Heaney v. Heeney*, 2 Denio, 625.

² Per Clifford, J., *Dutton v. Strong*, 1 Black, 23, 33; *Railroad Co. v. Han-ning*, 15 Wall. 649; *The Wharf Case*, 3 Bland, 361; *Dugan v. Baltimore*, 5 Gill & J. 357; *Brown v. Ellicott*, 2 Md. 75; *Swords v. Edgar*, 59 N. Y. 28; *Degan v. Dunlap*, 25 Alb. L. Jour. 103; *Columbus v. Grey*, 2 Bush, 476; *Galveston v. Menard*, 23 Texas, 349; *O'Neill v. Annett*, 25 N. J. L. 290.

³ *Ibid.*; *Burrows v. Gallup*, 32 Conn. 493.

⁴ *Page v. Baltimore*, 34 Md. 558; *Hazlehurst v. Baltimore*, 37 Md. 199.

See *Waddingham v. St. Louis*, 14 Mo. 190; *Murray v. Sharp*, 1 Bosw. 539.

⁵ *Broadway Ferry Co. v. Hankey*, 31 Md. 346.

⁶ *Fuller v. Eddings*, 11 Rich. (S. C.) 239; *Eddings v. Seabrook*, 12 Id. 504.

⁷ *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *Prescott v. Duquesne*, 48 Penn. St. 118. The damages caused by a failure to repair the wharf may be recovered by the defendant when sued for wharfage. *Buckbee v. Brown*, 21 Wend. 110.

and the right to collect these charges at public or private wharves carries with it the correlative duty to repair.¹ The right of wharf-owners to exact compensation from ships and vessels using a berth at their wharves, may be claimed upon an express or an implied contract. When the wharf is used without a definite agreement as to price, the proprietor is entitled to a just and reasonable remuneration for the use of his property and the benefit conferred.² Any individual owner of a wharf may use it for the purpose of landing his own goods, which are not dutiable, or he may permit others to do so upon such terms as he thinks proper to impose,³ and of which he gives notice.⁴ But no goods which are chargeable with a duty can be landed in any other place than a public port.⁵ Either the assent of the legislature or prescription is undoubtedly required to authorize the collection

¹ *Radway v. Briggs*, 35 N. Y. 256; 35 How. Pr. 422; *ante*, § 113; The Wharf Case, 3 Bland, 361; *Yarmouth v. Eaton*, 3 Burr. 1404; *James v. Johnson*, 2 Mod. 143; *Warrington v. Morley*, 4 Mod. 320; *Colton v. Smith*, Cowper, 47; *Freeman v. Walghan*, 2 Wils. 296. The mooring of rafts to an unimproved bank of a river does not create the relation of landlord and tenant between the riparian owner and the owner of the rafts. *Hall v. Jacobs*, 7 Bush. 595. As to the action of use and occupation in relation to docks, see *Hathaway v. Ryan*, 35 Cal. 188; *Camden R. R. v. Finch*, 5 Sand. (N. Y.) 48; *Mangum v. Farrington*, 1 Daly (N. Y.) 236; *Moore v. Jackson*, 2 Abb. (N. C.) 211. The use of a pier projecting from a bulkhead in such manner as to prevent the owner from using his wharf, is a tort, and does not give rise to an implied contract to pay wharfage. *Camden Railroad Co. v. Finch*, 5 Sand. 48. And, if the grantor of a wharf, together with the right to collect wharfage thereat, builds another wharf so as to obstruct that which is granted, it is not a continuing trespass under the statute of

limitations. *Van Zandt v. New York*, 8 Bosw. 375.

² *Ex parte Easton*, 95 U. S. 68, 73.

³ *Hale, De Portibus Maris*, c. 6; *Hargrave's Law Tracts*, 76; *Woolrych on Waters*, 301; *Gunning on Tolls*, 123, 126; *Sargent v. Reed*, 2 Stra. 1228; 1 Wils. 91; *Stephens v. Coster*, 3 Burr. 1409; 1 W. Bl. 413; *Colton v. Smith*, 1 Cowper, 47; *Wyatt v. Thompson*, 2 Esp. 252; *Dutton v. Strong*, 1 Black. 32; *Ensminger v. People*, 47 Ill. 384; *Chicago v. Laflin*, 49 Ill. 172; The Wharf Case, 3 Bland, 361; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *O'Neill v. Annett*, 27 N. J. L. 290; *The Volusia*, 3 Wall. Jr. 375. See *Allnut v. Inglis*, 12 East, 527; *Hargrave's Law Tracts*, 77, 78.

⁴ *Southern Steamship Co. v. Sparks*, 22 Texas, 657; *The Magnolia v. Marshall*, 39 Miss. 109; *The Buckeye State*, Newb. Adm. 69; *Croucher v. Wilder*, 98 Mass. 322.

⁵ The Wharf Case, 3 Bland, 361; *Hale, De Portibus Maris*, c. 6; *Hargrave*, 78.

of fixed rates of wharfage;¹ and if a wharf is unlawfully extended into navigable waters upon the soil of the State, no compensation can be demanded by an individual for use of that part of the wharf which is beyond the line of his rightful ownership.²

§ 121. An unlawful obstruction to navigation, being a common nuisance, is remediable by indictment,³ or by abatement;⁴ or a court of equity may take jurisdiction upon an information filed by an attorney general.⁵ Equity will not

¹ *Wiswall v. Hall*, 3 Paige, 313; *People v. Broadway Wharf Co.*, 31 Cal. 34; *People v. San Francisco Railroad Co.*, 35 Cal. 606; *Taylor v. Beebe*, 1 Rob. 268; *O'Conley v. Natchez*, 1 S. & M. 31.

² *Gunter v. Geary*, 1 Cal. 462; *Coburn v. Ames*, 52 Cal. 385; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384. Cases relating to wharf privileges and wharfage, upon special facts, are: *McNairy v. Paine*, 9 Humph. 533; *Columbus v. Grey*, 2 Bush, 477; *Child v. Chappell*, 9 N. Y. 246; *Albany v. Trowbridge*, 5 Hill, 71; 7 Hill, 429; *Memphis Packet Co. v. Grey*, 9 Bush, 148; *Long Wharf v. Palmer*, 37 Maine, 379; *Stockwell v. Brewer*, 59 Maine, 286; *Union Wharf Co. v. Hemingway*, 12 Conn. 293; *Gregory v. Brooks*, 35 Conn. 437; *Union Wharf v. The J. H. Starin*, 45 Conn. 585; 15 Blatch. 473; *Deweese v. Adger*, 2 McCord (S. C.) 105; *Fitzsimons v. Milor*, 2 Rich. (S. C.) 371; *People v. San Francisco Gaslight Co.*, 54 Cal. 248; *Bersie v. The Shenandoah*, 21 Mo. 18; *Keokuk Co. v. Quincy*, 81 Ill. 422; *Whitney v. New York*, 6 Abb. (N. C.) 330, n.; *Langdon v. New York*, Ibid. 314; *Russell v. The Empire State, Newb. Adm.* 542; *Thompson v. New York*, 11 N. Y. 115; 3 Sand. 487; *Kelsey v. Murray*, 28 How. Pr. 243; 18 Abb. Pr. 294; *Linthicum v. Ray*, 9 Wall. 241; *Russell v. The Asa R. Swift*, 1

Newb. Adm. 553. A mere right to collect wharfage for a term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament. *De Witt v. Hays*, 2 Cal. 463; *Commissioners v. Clark*, 35 N. Y. 251; *Langdon v. New York*, 6 Abb. (N. C.) 314; *Kelsey v. Murray*, 18 Abb. Pr. 294; 28 How. Pr. 243.

³ *Hale, De Jure Maris*, c. 3, and *De Portibus Maris*, c. 7; *Hargrave's Law Tracts*, 9, 88; *Rex v. Russell*, 6 B. & C. 566; *Rex v. Ward*, 4 Ad. & El. 384; *Rex v. Grosvenor*, 2 Stark. 511; *Rex v. Morris*, 1 B. & Ad. 441; *Rex v. Tindall*, 6 Ad. & El. 143; *Reg. v. Betts*, 16 Q. B. 1022; *Reg. v. Randall*, 1 Car. & M. 496; *Commonwealth v. Wright*, 3 Am. Jur. 185; *Commonwealth v. Alger*, 7 Cush. 53; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Horton*, 64 N. Y. 610; *Gates v. Blencoe*, 2 Dana, 158; *Walker v. Shepardson*, 2 Wis. 384; *Allegheny v. Zimmerman*, 95 Penn. St. 287.

⁴ *Post*, § 128.

⁵ *Attorney General v. Burrige*, 10 Price, 350; *Attorney General v. Parmenter*, Ibid. 378, 412; *Attorney General v. Johnson*, 2 Wils. Ch. 87; *Attorney General v. Richards*, 1 Anst. 603; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Attorney General v. Tomline*, 12 Ch. D. 214; *Attorney General v. Cleaver*, 18 Ves. 211; *Georgetown v. Alexandria Canal Co.*,

interfere, even upon an information in the name of the State, when the injury to the public is doubtful or prospective, but will leave the question of nuisance or not nuisance to be tried before a jury.¹ When the nuisance causes both a public and a private injury, a suit in equity may be brought by information and bill.² An individual may maintain a bill, without the attorney general, in respect to a public nuisance which causes him special damage.³ If a public nuisance, such as a bridge which obstructs the navigation, will also

12 Peters, 91; Attorney General *v.* Utica Ins. Co., 2 Johns. 371, 382; Attorney General *v.* Cohoes Co., 6 Paige, 133; Yolo Co. *v.* Sacramento, 36 Cal. 193; Eden on Injunctions, c. 11; 2 Story Eq. Jur. § 921, *et seq.*; Rowe *v.* Granite Bridge Co., 21 Pick. 344; Attorney General *v.* Salem, 103 Mass. 138; Haskell *v.* New Bedford, 108 Mass. 208, 216; Attorney General *v.* Boston Wharf Co., 12 Gray, 553; Attorney General *v.* New Jersey Railroad Co., 2 Green Ch. 136; Newark Plank Road Co. *v.* Elmer, 9 N. J. Eq. 755; Attorney General *v.* Hudson River Railroad Co., *Ibid.*, 526; Gifford *v.* New Jersey Railroad Co., 10 N. J. Eq. 177; Attorney General *v.* Delaware Railroad Co., 27 N. J. Eq. 1, 631; Allen *v.* Monmouth Co., 2 Beas. 68.

¹ 2 Story Eq. Jur. § 923, 925 *a*; Crowder *v.* Tinkler, 19 Ves. 617; Ripon *v.* Hobart, 3 Myl. & K. 169, 179; Baines *v.* Baker, 1 Ambl. 158; Irwin *v.* Dixon, 9 How. 10; Attorney General *v.* Heishon, 3 C. E. Green, 410; Attorney General *v.* New Jersey Railroad Co., 2 Green Ch. 136; Attorney General *v.* Stewart, 5 C. E. Green, 415; Hartshorn *v.* South Reading, 3 Allen, 501; Mohawk Bridge Co. *v.* Utica Railroad Co., 6 Paige, 554; Rochester *v.* Curtiss, Clarke Ch. 336; Fisk *v.* Wilbur, 7 Barb. 395; Rochester *v.* Erickson, 46 Barb. 92; Gervais *v.* Charlestown, 11 Rich. Eq. (S. C.) 432; Attorney General *v.* Lea, 3 Ired. Eq. 301; Bigelow *v.* Hartford

Bridge Co., 14 Conn. 582; Ramsey *v.* Riddle, 1 Cranch, C. C. 399.

² Attorney General *v.* Lonsdale, L. R. 7 Eq. 377; Attorney General *v.* Forbes, 2 Myl. & Cr. 123.

³ *Ibid.*; Spencer *v.* London Railway Co., 8 Sim. 193; Sampson *v.* Smith, 8 Sim. 272; Cook *v.* Bath, L. R. 6 Eq. 177; Hickok *v.* Hine, 23 Ohio St. 523, and authorities in next note; Mississippi Railroad Co. *v.* Ward, 2 Black, 485; Irwin *v.* Dixon, 9 How. 10; Parker *v.* Winnipiseogee Lake Co., 2 Black, 545; Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518, 561; Ewell *v.* Greenwood, 26 Iowa, 377; Musser *v.* Hershey, 42 Iowa, 356; Park *v.* The C. & S. W. R. Co., 43 Iowa, 636; Works *v.* Junction Railroad, 5 McLean, 425; United States *v.* Railroad Bridge Co., 6 McLean, 517; Spooner *v.* McConnell, 1 McLean, 337; Treat *v.* Bates, 27 Mich. 390; Walker *v.* Shepardson, 2 Wis. 384; 4 Wis. 496; Hamilton *v.* Whitridge, 11 Md. 128; Columbus *v.* Jaques, 30 Ga. 506; Savannah Railroad Co. *v.* Shields, 33 Ga. 601; Potter *v.* Menasha, 30 Wis. 492; Draper *v.* Mackey, 35 Ark. 497; Adams *v.* Popham, 76 N. Y. 410; Sparhawk *v.* Union Passenger Car Co., 54 Penn. St. 401; Prince *v.* McCoy, 40 Iowa, 533; Manhattan Gaslight Co. *v.* Barker, 36 How. Pr. 233; Penniman *v.* New York Balance Co., 13 Id. 40; Parrish *v.* Stephens, 1 Or. 73; Shed *v.* Hawthorne, 3 Neb. 186; Kittle *v.* Tremont, 1 Neb. 329.

affect the private rights of each of several private owners injuriously and in the same way, they may join as complainants in a bill to restrain the erection of the structure, or each may sue alone.¹ Jurisdiction will not be taken upon a bill thus filed by an individual which discloses only detriment to the community at large, and does not set forth facts showing peculiar and irreparable injury to the plaintiff;² and a court

¹ *Barnes v. Racine*, 4 Wis. 454; *Pettibone v. Hamilton*, 40 Wis. 402; *Cadigan v. Brown*, 120 Mass. 493; *Murray v. Hay*, 4 Sand. Ch. 362; 1 Barb. Ch. 59; *Reid v. Gifford*, Hopk. Ch. 416; *Emery v. Erskine*, 66 Barb. 9; *Peck v. Elder*, 3 Sand. 126; *Brady v. Weeks*, 3 Barb. 157; *Foot v. Bronson*, 4 Lans. 47; *Robinson v. Baugh*, 31 Mich. 290; *Middleton v. Flat River Co.*, 27 Mich. 533; *Grant v. Schmidt*, 22 Minn. 1; *Schultz v. Winter*, 7 Nev. 130. *Contra*, *Hudson v. Maddison*, 12 Sim. 416; *Hinchman v. Paterson Railroad Co.*, 17 N. J. Eq. 75; *Morris Railroad Co. v. Prudden*, 20 Id. 530. Even where this rule does not prevail, the objection of misjoinder of plaintiffs must be raised by the pleadings, and cannot be taken at the hearing, if the real point in controversy can be determined in the suit. See *Hamilton v. Whitridge*, 11 Md. 128.

² 2 Story Eq. Jur. §§ 924-926; *Crowder v. Tinker*, 19 Ves. 616; *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Attorney General v. Birmingham*, 4 K. & J. 528; *Works v. Junction Railroad*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Hartshorn v. South Reading*, 3 Allen, 501; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Fall Village Co. v. Tibbetts*, 31 Conn. 169; *Frink v. Lawrence*, 20 Conn. 120; *Norwich Gas Light Co. v. Norwich Gas Co.*, 25 Conn. 35; *O'Brien v. Norwich Railroad Co.*, 17 Conn. 372; *Saeley v. Bishop*, 19 Conn. 128; *Thorn-*

ton v. Grant, 10 R. I. 477; *Hamilton v. Whitridge*, 11 Md. 128; *Fort v. Groves*, 29 Md. 188; *New York v. Baumberger*, 7 Rob. 219; *Hudson River Railroad Co. v. Loab*, *Ibid.* 418; *Knox v. New York*, 55 Barb. 404; *Mohawk Bridge Co. v. Utica Railroad Co.*, 6 Paige, 554; *Corning v. Lowerre*, 2 Johns. Ch. 439; *Smith v. Lockwood*, 13 Barb. 209; *Davis v. New York*, 14 N. Y. 506; 3 Duer, 119; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 311, 347; *Watertown v. Cowen*, 4 Paige, 510; *Savannah Railroad v. Shields*, 33 Ga. 601; *Mechling v. Kittanning Bridge Co.*, 1 Grant, 416; *Ewell v. Greenwood*, 26 Iowa, 377; *Delaware Railroad Co. v. Stump*, 8 Gill & J. 479; *Jarvis v. Santa Clara Valley Railroad Co.*, 52 Cal. 438; *Stevens v. Paterson Railroad Co.*, 5 C. E. Green, 126; *Scudder v. Trenton Falls Co.*, Sax. 694; *Southard v. Morris Canal Co.*, *Id.* 518; *Denver Railway Co. v. Denver City Railway Co.*, 2 Col. 673; *Ingram v. The C. D. & M. R. R. Co.*, 38 Iowa, 669; *Prince v. McCoy*, 40 Iowa, 533; *Prosser v. Ottumwa*, 42 Iowa, 509; *Delaware Railroad Co. v. Stump*, 8 Gill & J. 479; *Roman v. Strauss*, 10 Md. 89; *Fort v. Groves*, 29 Md. 188; *Baltimore v. Gill*, 31 Md. 375; *Heerman v. Beef Slough Manuf. Co.*, 1 Fed. Rep. 145; *Dawson v. St. Paul Ins. Co.*, 15 Minn. 136; *Walker v. Shepardson*, 4 Wis. 486; *Shed v. Hawthorne*, 3 Neb. 179; *Middleton v. Franklin*, 3 Cal. 238; *Beveridge v. Lacey*, 3 Rand. 63; *Arnold v. Klepper*, 24 Mo. 273; *Coast Line Railroad Co. v. Cohen*, 50 Ga. 451; *Frizzle v. Patrick*, 6 Jones Eq. 354.

of equity will act with caution upon such a bill where an erection, such as a bridge or public mill, tends to promote the public convenience.¹ The remedy by abatement is, according to numerous authorities, coextensive and concurrent with that by indictment.² Upon an indictment against a person who has obstructed the navigation, and who relies upon a license from the government to justify the act, he is required to prove compliance with every requirement of the statute, as an exception.³ In such a case, the indictment must aver that the limits of the statute are exceeded, and that the erection is not in pursuance of the authority given by the statute.⁴ An indictment against a bridge corporation for neglect of a provision of its charter that "said bridge shall be so constructed as not to prevent the navigation of said waters," must directly allege that the bridge prevents navigation.⁵ By an uninterrupted user for twenty years the public may acquire a prescriptive right of navigation in inland waters which are private property;⁶ but lapse of time will not legalize a public nuisance.⁷ The continuance of a

¹ *Barnes v. Calhoun*, 2 Ired. Eq. 199.

² *Post*, § 128; *Knox v. Chaloner*, 42 Maine, 150; *Arundell v. McCulloch*, 10 Mass. 70; *Coates v. New York*, 7 Cowen, 585; *Miles v. Hall*, 9 Wend. 315; *Hart v. Albany*, 9 Wend. 571; *Renwick v. Morris*, 3 Hill (N. Y.) 621; 7 *Ibid.* 575; *Wetmore v. Tracy*, 14 Wend. 250.

³ *Commonwealth v. Church*, 1 Penn. St. 105; *Renwick v. Morris*, 3 Hill (N. Y.) 621; 7 *Ibid.* 575; *Knox v. Chaloner*, 42 Maine, 150; *State v. Freeport*, 43 Maine, 198; *State v. Dibble*, 4 Jones (N. C.) 107, 115; *State v. Parrott*, 71 N. C. 311; *Healy v. Joliet Railroad Co.*, 2 Brad. (Ill.) 435; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410.

⁴ *State v. Godfrey*, 24 Maine, 232; *Rex v. Liverpool*, 3 East, 86.

⁵ *State v. Penobscot Railroad Co.*, 57 Maine, 402.

⁶ *Wheeler v. Spinola*, 54 N. Y. 377;

Delaney v. Boston, 2 Harr. (Del.) 489; *Burbaker v. Paul*, 7 Dana, 429; *Coolidge v. Learned*, 8 Pick. 504; *Shaw v. Crawford*, 10 Johns. 236, 240; *Ingram v. Police Jury*, 20 La. Ann. 226. Individuals acquire by user no prescriptive right to navigate a public river, transversely or otherwise. *Bird v. Smith*, 8 Watts, 434. See *Pearsall v. Post*, 20 Wend. 111; 22 Wend. 425; *Curtis v. Keesler*, 14 Barb. 511.

⁷ *Folkes v. Chad*, 3 Dougl. 340; *King v. Montague*, 4 B. & C. 598; *Weld v. Hornby*, 7 East, 195, 199; *Rex v. Cross*, 3 Camp. 224, 227; *Carter v. Murcot*, 4 Burr. 2162; *Vooght v. Winch*, 2 B. & Ald. 662; *People v. Cunningham*, 1 Denio, 524; *Pierson v. Elgar*, 4 Cranch, C. C. 454; *Coates v. New York*, 7 Cowen, 558; *Crill v. Rome*, 47 How. Pr. 398; *Rochester v. Erickson*, 46 Barb. 921; *Ogdensburg v. Lovejoy*, 58 N. Y. 662; 2 Sup. Ct. 83; *Campbell v. Seaman*, 2 Sup.

nuisance for twenty years will not defeat either a prosecution for obstructing navigation,¹ or the remedy by abatement;² nor is it a bar to an action by an individual for special damage thereby caused.³ This rule applies to streams which are merely floatable, as well as to those which are navigable in the larger sense.⁴ If specific penalties are imposed by statute, they are merely cumulative and not exclusive of the ordinary remedies, unless the intent to exclude them clearly appears in the act.⁵ But when an appropriate method of *redress* is provided by statute for a failure to observe its requirements, it

Ct. 231; *Mills v. Hall*, 9 Wend. 315; *Renwick v. Morris*, 7 Hill (N. Y.) 575; 3 *Ibid.* 621; *Kellogg v. Thompson*, 66 N. Y. 88; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108, 114; *Simmons v. Cornell*, 1 R. I. 519; *Knox v. Chaloner*, 42 Maine, 150; *Davis v. Winslow*, 51 Maine, 293; *Gerrish v. Brown*, *Ibid.* 256; *Dyer v. Curtis*, 72 Maine, 181; *Commonwealth v. Howes*, 15 Pick. 231, 233; *Veazie v. Dwinel*, 50 Maine, 479; *Stoughton v. Baker*, 4 Mass. 522; *Arundel v. McCullough*, 10 Mass. 70; *Commonwealth v. Upton*, 6 Gray, 473; *Lewis v. Stein*, 16 Ala. 214; *Philadelphia's Appeal*, 78 Penn. St. 33; *Pettis v. Johnson*, 56 Ind. 139; *De Laney v. Blizzard*, 7 Hun, 7; *House v. Metcalf*, 27 Conn. 639; *Philadelphia Railroad Co. v. State*, 20 Md. 157; *North Central Railway Co. v. Baltimore*, 21 Md. 93; *Piereson v. Elgar*, 4 Cranch, C. C. 454; *Cottrill v. Myrick*, 12 Maine, 222; *State v. Franklin Falls Co.*, 49 N. H. 240; *Bird v. Smith*, 8 Watts, 434; *Commonwealth v. McDonald*, 16 S. & R. 390; *Commonwealth v. Alburger*, 1 Wharton, 469; *Penny Pot Landing*, 16 Penn. St. 79, 94; *Philadelphia v. Philadelphia Railroad Co.*, 58 Penn. St. 253; *Johnson v. Irwin*, 3 S. & R. 292; *Douglass v. State*, 4 Wis. 387; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540; *Ingram v. Police Jury*, 20 La. Ann. 226; *People v. Pope*, 53 Cal. 437; *Nimmo v. Commonwealth*, 4 If. & M. (Va.) 57; *Woolrych on Waters*, 270.

¹ *Ibid.*

² *Ibid.*; *Knox v. Chaloner*, 42 Maine, 150; *Renwick v. Morris*, 3 Hill (N. Y.) 621; 7 *Ibid.* 575; *Miles v. Hall*, 9 Wend. 315; *Stafford v. Ingersoll*, 3 Hill, 38, 41.

³ *Mills v. Hall*, 9 Wend. 315; *Morton v. Moore*, 15 Gray, 573, 576.

⁴ *Knox v. Chaloner*, 42 Maine, 150; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53. Whether the obstruction is accidental or intentional, it will not deprive the stream of its natural character as a highway. *Treat v. Lord*, 42 Maine, 552.

⁵ 6 Bacon's Abr. tit. Statute G.; 2 Inst. 200; 2 Hawk. P. C. 301, 302; *Rex v. Robinson*, 2 Burr. 799, 803; *Dwarris on Statutes*, 678; *Commonwealth v. Ruggles*, 10 Mass. 391; *Waterford Turnpike Co. v. People*, 9 Barb. 161; *Renwick v. Morris*, 3 Hill (N. Y.) 621; 7 *Ibid.* 575; *Wetmore v. Tracy*, 14 Wend. 250, 255; *Jackson v. Bradt*, 2 Caines, 169; *Pennington v. Townsend*, 7 Wend. 276, 280; *Crittenden v. Wilson*, 5 Cowen, 165; *Stafford v. Ingersoll*, 3 Hill, 38. A statute, declaring the obstruction of a private watercourse to be a public nuisance and indictable as such, is merely cumulative and does not deprive the riparian proprietors of the common-law remedy of an action on the case or the right to abate the nuisance. *Welton v. Martin*, 7 Mo. 307; *State v. Moffett*, 1 G. Greene, 247.

is exclusive of the common-law remedies, as by abatement.¹ If a bridge or road, constructed in a town across navigable waters, is built or laid out under an authority which is adjudged void, the town is under no obligation to keep it in repair,² unless it has so far treated the place as a public street, that it is estopped from denying that it is a public highway.³ A tenant cannot controvert his landlord's title, and, if no action is taken on behalf of the public for the removal of a mill erected upon the bed of a navigable stream, the lessee thereof cannot set up in defence to an action by the landlord for the possession, that the possession, if restored, would be an unlawful obstruction of the navigation.⁴ So, in an action on the case for diverting water from the plaintiff's mill, it is no defence that the mill is built in the public domain of tide waters;⁵ and the fact that a dam prevents the public passage of lumber does not justify a lower proprietor in causing the water to flow back upon the dam.⁶

§ 122. The general rule is that individuals are not entitled to redress against a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons.⁷ If, however, a

¹ *Criswell v. Clugh*, 3 Watts, 330; *Spigelmoyer v. Walter*, 3 Watts & S. 540; *Brown v. Commonwealth*, 3 Serg. & R. 273; *post*, § 250.

² *Commonwealth v. Charlestown*, 1 Pick. 180; *Jones v. Andover*, 9 Pick. 146.

³ *Mayor v. Sheffield*, 4 Wall. 189; *Houfe v. Fulton*, 34 Wis. 608; *Codner v. Bradford*, 3 Chand. (Wis.) 291; *Williams v. Cummington*, 18 Pick. 312; *Leavenworth v. Laing*, 6 Kansas, 274; *McDonough v. Virginia City*, 6 Nev. 90; *Bissell v. Railroad Co.*, 22 N. Y. 258; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.

⁴ *St. Anthony Falls Co. v. Morrison*, 12 Minn. 249. It is no defence

to an undertaking given on suing out an injunction that the business which the defendant enjoined was a public nuisance. *Cunningham v. Breed*, 4 Cal. 384.

⁵ *Simpson v. Seavey*, 8 Maine, 138; *Houston Railroad Co. v. Parker*, 50 Texas, 330.

⁶ *Odiorne v. Lyford*, 9 N. H. 502; *Lincoln v. Chadbourne*, 56 Maine, 200; *Stiles v. Hooker*, 7 Cowen, 266.

⁷ *Bigelow, C. J.*, in *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 101; *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, *Ibid.* 511, 514; *Borden v. Vincent*, 24 Pick. 301; *Quincy Canal v. Newcomb*, 7 Met. 276, 283; *Holman v. Townsend*, 13 Met. 297,

public nuisance, such as an unlawful obstruction to a common passage, causes peculiar damage to an individual, he may maintain an action therefor. In such case, the declaration or complaint need not negative the lawfulness of the obstruction, or its continuance for a reasonable length of time, or that it was unavoidable because of inevitable accident, these being matters of defence to be set up by answer.¹ But the particular damage is the gist of the action, and must be specifically set forth in the declaration.² It is not enough that injury is shown, but it must be different in kind from

299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Connecticut River Railroad Co.*, 7 Cush. 506, 511; *Blood v. Nashua & Lowell Railroad*, 2 Gray, 140; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, *Ibid.* 501; *Fall River Iron Works Co. v. Old Colony Railroad*, 5 Allen, 224; *Shaubut v. St. Paul Railroad Co.*, 21 Minn. 502; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Gordon v. Baxter*, 74 N. C. 470; *In re Eldred*, 46 Wis. 530, 541; *Abbott v. Mills*, 3 Vt. 521; *Hatch v. Vermont Central Railroad Co.*, 28 Vt. 142, *Low v. Knowlton*, 26 Maine, 128; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Lansing v. Wiswall*, 5 Denio, 213; 5 How. Pr. 77; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Anderson v. Rochester Railroad Co.*, 9 How. Pr. 553; *Dougherty v. Bunting*, 1 Sand. 1; *Purcell v. Potter*, *Anth.* (N. Y.) 310; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *State v. Thompson*, 2 Strob. (S. C.) 12; *Cary v. Brooks*, 1 Hill (S. C.) 365; *Commissioners v. Taylor*, 2 Bailey (S. C.) 282; *McLaughlin v. Charlotte Railroad Co.*, 5 Rich. (S. C.) 593; *Harrison v. Sterrett*, 4 H. & McH. 540; *Wroe v. State*, 8 Md. 416; *Baltimore v. Marriott*, 9 Md. 160; *Flynn v. Canton Co.*, 40 Md. 312; *Walter v. County Commissioners*, 35 Md. 385; *South Carolina Rail-*

road Co. v. Moore, 28 Ga. 398; *Gordon v. Baxter*, 74 N. C. 470; *Dunn v. Stone*, 2 Car. L. Rep. 261; *Morgan v. Graham*, 1 Woods, 124; *L. T. Co. v. S. & W. R. Co.*, 41 Cal. 562.

¹ *Enos v. Hamilton*, 27 Wis. 256. Erections in navigable waters, which are near the shore, and are not prohibited by any positive law or regulation, are presumed not to be obstructions to navigation, and he who alleges that they are obstructions must prove it. *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, 10 Wall. 497.

² *Baker v. Boston*, 12 Pick. 184, 196; *Atkins v. Boardman*, 2 Met. 457; *Houck v. Wachter*, 34 Md. 265; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114; *Hall v. Kitson*, 4 Chand. (Wis.) 20; *Greene v. Nunnemacher*, 36 Wis. 50; *Carpenter v. Mann*, 17 Wis. 155; *Powers v. Irish*, 23 Mich. 429; *Dwinel v. Veazie*, 44 Maine, 167, 175; *Roseburg v. Abraham*, 8 Oregon, 509; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *Bristol Manuf. Co. v. Gridley*, 28 Conn. 201; *Taylor v. Monroe*, 43 Conn. 36; *Tomlinson v. Derby*, *Id.* 562. See *South Carolina v. Georgia*, 93 U. S. 4, 14; *Smith v. McConathy*, 11 Mo. 517; *Welton v. Martin*, 7 Mo. 307; *Payne v. McKinley*, 54 Cal. 532. But it is not indispensable to a recovery that the injury shall be proved precisely as alleged. *Memphis Railroad Co. v. Hicks*, 5 Sneed, 427. And if a declaration in case de-

that sustained by the community at large.¹ If a bridge is unlawfully constructed across a navigable stream and arm of the sea, the direct injury is to the navigation of the stream, which is a public interest, and the fact that the plaintiff alone navigates the river, and is the owner of the only wharf thereon above the bridge, being merely proof that the consequential damage to him is greater in degree than to others, does not establish his right to maintain an action, as other riparian owners and the rest of the public may suffer in the same way whenever they use the stream.² "The case," says Gray, C. J.,³ "has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land,⁴ or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff." Where the plaintiff's predecessor in title dredged out a channel exceeding one thousand feet in length, about one-fourth of which was within his own dock, and the rest extended seaward through flats owned by other persons, it was held that the action of a city, in filling up by its sewers

fectively sets out the special damage sustained by the plaintiff in consequence of the obstruction preventing his passage with boats, the defect is cured by a verdict in his favor, if the issue joined compels him to prove the special injury. *Hall v. Kitson*, 4 Chand. (Wis.) 20; 3 Pin. 296. Damages sustained by an individual after action brought are recoverable in such action. *Duncan v. Markley*, Harper (S. C.) 276.

¹ *Ibid.*; *Houck v. Wachter*, 34 Md. 265; *Schall v. Nusbaum*, 56 Md. 512; *Gilbert v. Morris Canal Co.*, 8 N. J. Eq. 495.

² *Blackwell v. Old Colony Railroad Co.*, 122 Mass. 1; *Blood v. Nashua Railroad Co.*, 2 Gray, 137; *Lawrence v. Fairhaven*, 5 Gray, 110; *Brightman v. Fairhaven*, 7 Gray, 271; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn*

v. South Reading, 3 Allen, 501; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218; *Borden v. Vincent*, 24 Pick. 301; *Smith v. Boston*, 7 Cush. 257; *Thayer v. New Bedford Railroad*, 125 Mass. 253; *Breed v. Lynn*, 126 Mass. 367.

³ 122 Mass. 3.

⁴ The defendant would be liable for such injury. *Turner v. Blodgett*, 5 Met. 240; *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Rowan v. Johnson*, *Ibid.* 154; *Delaware Canal Co. v. Lee*, 22 N. J. L. 243; *Glover v. Powell*, 10 N. J. Eq. 211; *Carson v. Coleman*, 11 N. J. Eq. 106; *Crittenden v. Wilson*, 5 Cowen, 165; *Steele v. Western Inland Lock Navigation Co.*, 2 Johns. 283.

the portion of the channel which was beyond the limits of the plaintiff's ownership, did not create an injury which differed in kind from that suffered by other persons owning lands upon the harbor or navigating over the flats, and was not remediable by private action, although access to the plaintiff's wharf was thereby rendered more difficult and expensive, and the wharf itself less valuable.¹ If a portion of a lot of flats is taken by a railroad corporation under the right of eminent domain, and the access from navigable water to the remaining portion is thereby cut off, the value of such access may be considered by the jury in estimating the land-owner's injury; but the possibility that the corporation may construct side-tracks on the flats not taken for the purpose of filling the same more easily, or for business purposes, is not an element to be taken into consideration.²

§ 123. If the wrong is actionable, it is none the less so because it is committed in such a way that the defendant may be liable to a public prosecution.³ Where sewers constructed by a city caused a creek to be filled up directly in front of and adjoining the plaintiff's wharf, so that his vessels could not lie at the wharf on account of the diminished depth of the water, the injury to the plaintiff was held to be different in kind and not merely in degree from that sustained by the general public, and the plaintiff recovered damages in a private suit for this injury.⁴ The court dis-

¹ *Breed v. Lynn*, 126 Mass. 367. The defendant in this case did not except to the damages assessed for the filling of that part of the channel which was within the limit of the plaintiff's ownership. See, also, *Barron v. Baltimore*, 2 Am. Jur. 203.

² *Drury v. Midland Railroad*, 127 Mass. 571; *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 25; *Boston & Worcester Railroad v. Old Colony Railroad*, 12 Cush. 605; *Willard v. Cambridge*, 3 Allen, 574; *Harvard College v. Stearns*, 15 Gray, 1; *Clement v. Burns*, 43 N. H. 609.

³ *Brewer v. Boston Railroad Co.*, 113 Mass. 52, 58; *Commonwealth v. Vermont Railroad Co.*, 4 Gray, 22; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218; *Haskell v. New Bedford*, 108 Mass. 208.

⁴ *Brayton v. Fall River*, 113 Mass. 218. In *Haskell v. New Bedford*, 108 Mass. 208, which was a similar case, the court say that neither the special injury to the plaintiff by the filling up of his dock, nor that occasioned by making his premises offensive and unhealthy was merged in the common

tinguished the case from that of *Harvard College v. Stearns*,¹ in which it was held that a private action would not lie upon proof merely that the defendant had filled up a navigable creek and thereby rendered the plaintiff's land more difficult of access and less valuable. Whenever the obstruction immediately adjoins or is against the front of the plaintiff's premises, it is as to him a private nuisance for which an action will lie, or which may be restrained by injunction.² But when it is at a distance from the plaintiff's land, and the only injury which he sustains consists of inconvenience

nuisance. *Locks and Canals v. Lowell*, 7 Gray, 223; *Emery v. Lowell*, 104 Mass. 13; *Nichols v. Boston*, 98 Mass. 39; *Eames v. New England Worsted Co.*, 11 Met. 570; *Child v. Boston*, 4 Allen, 41; *Sherman v. Tobey*, 3 Allen, 7; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Boston v. Richardson*, 19 How. 263; 24 How. 188; *Gerrish v. Brown*, 51 Maine, 256; *Franklin Wharf v. Portland*, 67 Maine, 46; *Frink v. Lawrence*, 20 Conn. 117; *Clark v. Peckham*, 9 R. I. 455; 10 R. I. 35; *Attorney General v. Birmingham*, 4 Kay & Johns. 528.

¹ 15 Gray, 1.

² *Brayton v. Fall River*, 113 Mass. 218; *Haskell v. New Bedford*, 108 Mass. 208; *Blackwell v. Old Colony Railroad Co.*, 122 Mass. 1; *Breed v. Lynn*, 126 Mass. 367; *Barron v. Baltimore*, 2 Am. Jur. 203; *Boston v. Richardson*, 24 How. (U. S.) 188; *Simmons v. Lillystone*, 8 Exch. 431; *Blundell v. Catterall*, 5 B. & Ald. 287, 294, 304, 309; *Somerset v. Fogwell*, 5 B. & C. 883; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. R. 281; *Rose v. Groves*, 5 M. & G. 613; 6 Scott, N. R. 645; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Green v. Kleinhaus*, 2 Green (N. J.) 472; *Williams v. Tripp*, 11 R. I. 453; *Abbott v. Mills*, 3 Vt. 521; *Cotton v. Mississippi Boom Co.*, 19 Minn. 497; *Wilder v. De Cou*, 26 Minn. 10; *Walker v. Shepardson*, 2 Wis. 384; 4 Wis. 486; *Potter v.*

Menasha, 30 Wis. 492; *Williams v. Smith*, 22 Wis. 594; *Hobart v. Milwaukee City Railroad Co.*, 27 Wis. 194; *C. B. Railroad Co. v. Twine*, 23 Kansas, 585; *Frith v. Dubuque Railroad Co.*, 45 Iowa, 406; *Park v. C. & S. W. R. Co.*, 43 Iowa, 636; *Cowell v. Martin*, 43 Cal. 605; *Meyers v. St. Louis*, 8 Mo. App. 266; *Lackland v. North Missouri Railroad Co.*, 31 Mo. 180; 34 Mo. 259; *Price v. Knott*, 8 Oregon, 438; *Clark v. Peckham*, 10 R. I. 35; 9 R. I. 455; *Venard v. Cross*, 8 Kansas, 248; *Schulte v. North Pacific Transportation Co.*, 50 Cal. 52; *Yolo County v. Sacramento*, 369 Cal. 193; *Blanc v. Klumpke*, 29 Cal. 156; *Courtwright v. B. R. Co.*, 30 Cal. 585; *Aram v. Shallenberger*, 41 Cal. 449; *Clement v. Burns*, 43 N. H. 609, 617, 619; *Bowman v. Wathen*, 2 McLean, 376; *Blanchard v. Porter*, 11 Ohio, 138; *Crawford v. Delaware*, 7 Ohio St. 459; *Russell v. Burlington*, 30 Iowa, 262; *McMahon v. Council Bluffs*, 12 Iowa, 268; *Ewell v. Greenwood*, 26 Iowa, 377; *Cole v. Sprowl*, 35 Maine, 161; *Frink v. Lawrence*, 20 Conn. 117; *Reynolds v. Clarke*, 1 Pitts. (Pa.) 9; *Harrison v. Sterrett*, 4 Har. & McH. 540; *Strauss's Case*, 37 Md. 237; *Garitee v. Baltimore*, 53 Md. 422; *Enos v. Hamilton*, 27 Wis. 256. One who has only a leasehold interest in the premises may maintain the action. *Knox v. New York*, 55 Barb. 404; 38 How. Pr. 67; *De Laney v. Blizzard*, 7 Hun, 7.

or loss of access thereto, without direct and clearly defined damage other than the general depreciation of property common in a greater or less degree to all the riparian owners similarly situated, and preventable by an abatement of the nuisance, the plaintiff cannot maintain an action.¹

§ 124. The English decisions distinguish between injuries to the riparian right of access and those which accrue to persons exercising the public right of navigation. In *Rose v. Groves*,² in which an innkeeper recovered damages against the defendant for wrongfully preventing the access of guests to his house upon the river Thames, by placing timbers in the river opposite the inn, Tindall, C. J., said: ³ "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house on the river." In *Attorney General v. Conservators of the Thames*,⁴ Lord Hatherley said: "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally

¹ *Harvard College v. Stearns*, 15 Gray, 1; *Transportation Co. v. Chicago*, 99 U. S. 635; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 389; *McLaughlin v. Charlotte Railroad Co.*, 5 Rich. (S. C.) 583; *Kearns v. Cordwainers' Co.*, 6 C. B. N. s. 388; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *O'Brien v. Norwich Railroad Co.*, 17 Conn. 372; *Clark v. Saybrook*, 21 Conn. 222; *Seeley v. Bishop*, 19 Conn. 135; *Burrows v. Pixley*, 1 Root, 363; *Aram v. Shallenberger*, 41 Cal. 449; *Cowell v. Martin*, 43 Cal. 605; *Hopkins v. Western Pacific Railroad Co.*, 50 Cal. 190; *Schulte v. North Pacific Transportation Co.*, 50 Cal. 592; *George v. Northern Pacific Railroad Co.*, 50 Cal. 589; *Bigley v. Nunan*, 53 Cal. 403; *Severy v. Central Pacific Railroad Co.*, 51 Cal. 194; *Jarvis v. Santa Clara Valley Railroad Co.*, 52

Cal. 438; *Folsom v. Freeborn*, 23 Alb. L. Jour. 497; *Kinealy v. St. Louis Railway Co.*, 28 Am. Law. Reg. 124; *Harrison v. Sterrett*, 4 H. & McH. 540; *White v. Flannigan*, 1 Md. 539.

² 5 M. & G. 613; 6 Scott, N. R. 645; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. R. 281; *Pentley v. Lynn Paving Commissioners*, 13 W. R. 983; *Stephen v. Costor*, 3 Burr. 1408; *Wyatt v. Thompson*, 1 Esp. 252; *Anon.*, 1 Camp. 517, note; *Rex v. Russell*, 6 B. & C. 566; *Attorney General v. Conservators*, 1 H. & M. 1; *Kearns v. Cordwainers' Co.*, 6 C. B. N. s. 388; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, and L. R. 10 Ch. 679; *Moore v. Great Southern Railway Co.*, Ir. R. 10 C. L. 46; *Richardson v. Boston*, 24 How. 188; *Yates v. Milwaukee*, 10 Wall. 497; *Haskell v. New Bedford*, 108 Mass. 208, 216.

³ 5 Man. & G. 613; 6 Scott, N. R. 645.

⁴ 1 H. & M. 1.

different right from the public right of passing and repassing along the highway on the river." And in *Lyon v. Fishmongers' Company*,¹ Lord Cairns, L. C., said, referring to *Rose v. Groves*: "As I understand the judgment in that case, it went, not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff has been interfered with." — "Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties, when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." According to these decisions, which do not differ in principle from *Brayton v. Fall River* and *Haskell v. New Bedford*, it is the right of access to and from the highway, and not the right of access by means of the highway, which is regarded as a private right.² An obstruction in front of one's own premises may prevent his entering upon the highway and thus interfere with a peculiar right. But when he is once upon the highway, he is a traveller like the rest of the public, and though an obstruction at a distance may as effectually prevent ingress and egress as when it is opposite his door, yet the right to pass along the way is one which he shares in common with the general public. Injuries to riparian

¹ 1 App. Cas. 662; L. R. 10 Ch. 679; *Bell v. Quebec*, 5 App. Cas. 84; *Brown v. Gwy*, 2 Moo. P. C. (N. S.) 341; *Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Beckett v. Midland Railway Co.*, L. R. 3 C. P. 82; *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; *Miner v. Gilmour*, *Ibid.* 131; *Benjamin v. Storr*, L. R. 9

C. P. 400; *Fitz v. Hobson*, 28 W. R. 459, 722.

² In other words, the distinction is between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in the highway. See cases above cited; also, *Caledonian Railway Co. v. Ogilvy*, 2 Macq. Sc. App. 229; *Montreal v. Drummond*, 1 App. Cas. 384; *Bell v. Quebec*, 5 App. Cas. 84, 97

owners arising from obstructions to the navigation may thus differ from those sustained by members of the public who are simply prevented from exercising the common right of passage upon the water.

§ 125. A private action also lies, according to numerous decisions, in favor of the owners of vessels which have been wrecked or injured, without negligence on the part of those in charge, in consequence of unlawful obstructions in navigable waters; and such an action has frequently been maintained by those whose vessels have been thus delayed, or lost their voyage.¹ One who suffers no pecuniary damage from an obstruction in a highway, but is merely put to the inconvenience, common to all who use the way, of removing the obstruction or of taking a more circuitous route, cannot maintain an action.² In New York any expense or delay, however trifling, incurred by one member of the public in removing an unlawful obstruction in a highway has been held to be ground for an action,³ and damages may be recovered for a peculiar private injury caused thereby, though a like injury is sustained by numerous other persons.⁴

§ 126. It has been held that one who is prevented from abating the nuisance can recover the damages which he sus-

¹ *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *Guthrie v. McConnel*, 1 West. L. M. 593; *Porter v. Allen*, 8 Ind. 11; *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Irwin v. Sprigg*, 6 Gill, 203; *Owings v. Jones*, 9 Ind. 108; *Baltimore v. Marriott*, Id. 160; *Flower v. Adam*, 2 Taunt. 314; *Butterfield v. Forrester*, 11 East, 60; *Marriott v. Stanley*, 1 M. & G. 568; *Smith v. Smith*, 2 Pick. 621; *President v. Dusouchett*, 2 Cart. (Ind.) 586; *Kennard v. Burton*, 25 Maine, 39; *Harlow v. Humiston*, 6 Cowen, 189; *Plumer v. Alexander*, 12 Penn. St. 81; *Irwin v. Sprigg*, 2 Bland, 2.

² *Winterbottom v. Derby*, L. R. 2 Ex. 316; *Wiggin v. Boddington*, 3 C. & P. 544; *Fineaux v. Ilovenenden*, Cro.

Eliz. 664; *Hubert v. Groves*, 1 Esp. 148; *Carpenter v. Mann*, 17 Wis. 155; *Greene v. Nunnemacher*, 36 Wis. 50; *Houck v. Wachter*, 34 Md. 265; *Shipley v. Caples*, 17 Md. 179; *Garitee v. Baltimore*, 53 Md. 422, 437; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *McCowan v. Whitesides*, 31 Ind. 235; *Shed v. Hawthorne*, 3 Neb. 179; *Barr v. Stevens*, 1 Bibb, 292. See *Pittsburgh v. Scott*, 1 Penn. St. 309.

³ *Pierce v. Dart*, 7 Cowen, 609; *Lansing v. Wiswall*, 5 Denio, 213; *Lansing v. Smith*, 4 Wend. 9; 8 Cowen, 146; *Hudson River Railroad Co. v. Loeb*, 7 Rob. 418.

⁴ *Francis v. Schoellkopf*, 53 N. Y. 152; *Soltau v. De Held*, 2 Sim. n. s. 133.

tains by the consequent delay or loss of his voyage.¹ And, by the apparent weight of authority, at least of the older decisions, one who (being, as it is said, in actual occupation of the navigation, and not merely having it in contemplation²) is forced by the obstruction, not merely to go a longer way, but to carry his cargo overland in order to reach a particular point, or to abandon his voyage, suffers peculiar damage, distinguishable from that inflicted upon the general public and entitling him to recover the additional expenses to which he is unlawfully subjected.³ But the evidence of damage must be direct and positive;⁴ and if the plaintiff is himself responsible for the obstruction in whole or in part, or if his own want of ordinary caution is the cause of the injury,⁵ he cannot recover.⁶ A company, incorporated for the purpose of improving a navigable river which suffers a loss

¹ *Chichester v. Lethbridge*, Willes, 71; *Hart v. Bassett*, T. Jones, 156; *Winterbottom v. Derby*, L. R. 2 Ex. 316; *Hughes v. Heiser*, 1 Binney, 463.

² *Rose v. Miles*, 4 M. & S. 101.

³ Cases above, notes 1, 2; *Rose v. Miles*, 4 M. & S. 101; *Blagrove v. Bristol Water Works Co.*, 1 H. & N. 367; *Bacon v. Arthur*, 4 Watts, 437; *Williams v. Tripp*, 11 R. I. 447; *Hart v. Bassett*, T. Jones, 156; *Maynell v. Saltmarsh*, 1 Keb. 847; *Wiggins v. Boddington*, 3 Car. & P. 156; *Iveson v. Moore*, Carth. 451; 1 Ld. Raym. 486; Salk. 15; *Greasly v. Codling*, 2 Bing. 263; 9 Moore, 489; *Lyme Regis v. Henley*, 1 Bing. N. R. 222; 3 B. & Ad. 77; 2 Cl. & Fin. 331; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Dudley v. Kennedy*, 63 Maine, 465; *Brown v. Watson*, 47 Maine, 161; *Veazie v. Dwinel*, 50 Maine, 490; *Gerrish v. Brown*, 51 Maine, 256; *Cole v. Sprowl*, 35 Maine, 161; *Low v. Knowlton*, 26 Maine, 128; *Stetson v. Faxon*, 19 Pick. 147; *Atkins v. Bordman*, 2 Met. 457, 469; *Harvard College v. Stearns*, 15 Gray, 1, 6; *Blackwell v. Old Colony Railroad Co.*, 122 Mass. 1; *Jolly v. Terre Haute*

Drawbridge Co., 6 McLean, 237; *United States v. New Bedford Bridge*, 1 Wood. & M. 401; *Clark v. Peckham*, 10 R. I. 35; *Enos v. Hamilton*, 27 Wis. 256; *Hall v. Kitson*, 4 Chand. (Wis.) 20; *Pittsburgh v. Scott*, 1 Penn. St. 309; *Bacon v. Arthur*, 4 Watts, 437; *Rhines v. Clark*, 51 Penn. St. 96; *Philadelphia v. Collins*, 68 Penn. St. 106; *Philadelphia v. Gilmartin*, 71 Penn. St. 140; *Newbold v. Mead*, 57 Penn. St. 487; *Powers v. Irish*, 23 Mich. 429; *Martin v. Bliss*, 5 Blackf. 35; *Memphis Railroad Co. v. Hicks*, 5 Sneed, 427; *South Carolina Railroad Co. v. Moore*, 28 Ga. 398; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Brown v. Scofield*, 8 Barb. 239. *Contra*, *Carey v. Brooks*, 1 Hill (S. C.) 365; *McLauchlin v. Railroad Co.*, 5 Rich. (S. C.) 592; *Houston v. Police Jury*, 3 La. Ann. 566.

⁴ *Powers v. Irish*, 23 Mich. 429; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114; *Brown v. Watson*, 47 Maine, 161; *Milarkey v. Foster*, 6 Oregon, 378.

⁵ *Ante*, § 92; *post*, § 128.

⁶ *McGinnis v. Blackman*, 39 Mich. 111; *Flynn v. Canton Co.*, 40 Md. 312.

of its tolls in consequence of an unauthorized bridge across the river, may maintain a suit to prevent its completion.¹ So the obstruction of a canal, though amounting to a public nuisance, is actionable when it involves the breach of a private warranty.² The owner of a ferry beyond the limits of a city from which public travel is diverted by the failure of the city to keep a certain street in repair, suffers no injury other than that shared by the general public in being deprived of the right of passage, and is not entitled to maintain an action for such injury.³

§ 127. In *Enos v. Hamilton*,⁴ in Wisconsin, the plaintiff had a tannery in the village of New London on the Wolf River, and procured the bark necessary for carrying on his business at a point upon the Wolf River about sixty miles above New London, which was the only place where the bark required could be obtained. The Wolf River between these points is a navigable stream, and the defendants obstructed that part of the river so that the plaintiff could not obtain the bark, and his business was injured. It was held that peculiar damage to the plaintiff was established, and that the action could be maintained. The opinion refers to earlier decisions in Massachusetts,⁵ but is not reconcilable with the later decisions in that State.⁶ It has, however, more or less support in the decisions of other States.⁷

¹ Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61.

² *Bruning v. New Orleans Canal Co.*, 12 La. Ann. 541. Obstructions to the navigation do not excuse the breach of a contract to deliver merchandise by a certain day. *Dodge v. Van Lear*, 5 Cranch, C. C. 278.

³ *Prosser v. Ottumwa*, 42 Iowa, 509.

⁴ 27 Wis. 256; 24 Wis. 658; *Barnes v. Racine*, 4 Wis. 454; *Walker v. Shepardson*, 2 Wis. 384.

⁵ Citing *Stetson v. Faxon*, 19 Pick. 147; *Blood v. Nashua Railroad Co.*, 2 Gray, 137; *Smith v. Boston*, 7

Cush. 254; *Brainard v. Boston*, Id. 506; *Holmes v. Townsend*, 13 Met. 297; *Carpenter v. Mann*, 17 Wis. 155.

⁶ *Ante*, § 122.

⁷ *Tinsman v. Belvidere Delaware Railroad Co.*, 26 N. J. L. 148; 25 N. J. L. 255; *Shephard v. Barnett*, 52 Texas, 638; *Hickok v. Hine*, 23 Ohio St. 523. See *Maxwell v. Bay City Bridge Co.*, 46 Mich. 278; *New York v. Baumberger*, 7 Rob. (N. Y.) 219; *Hudson River Railroad Co. v. Loeb*, 7 Rob. 418; *Manhattan Gas-light Co. v. Barker*, 7 Rob. 523; 36 How. Pr. 233.

§ 128. A common nuisance may be abated without compensation¹ and without notice.² When a public highway is unlawfully obstructed, any individual who has occasion to use it, and is thereby stopped in his journey, may remove the obstruction in order to effect a passage;³ and he may enter upon the land of the person erecting or continuing the obstruction, if necessary to remove it.⁴ It has been held that the remedies by abatement and by indictment are in all respects concurrent and co-extensive, and that any person representing the public may abate a common nuisance.⁵ An individual cannot, however, abate a common nuisance, if it would cause a breach of the peace;⁶ and, although the public remedy may be pursued whenever the passage is partially obstructed, the master of a vessel would not be justified in running his vessel upon the obstruction unneces-

¹ *Coe v. Schultz*, 47 Barb. 64; *Manhattan Manufacturing Co. v. Van Keuren*, 23 N. J. Eq. 251.

² *Missouri River Packet Co. v. Hannibal Railroad Co.*, 1 McCrary, 281.

³ *Arundel v. McCulloch*, 10 Mass. 70; *Wales v. Stetson*, 2 Mass. 143; *Garey v. Ellis*, 1 Cush. 307; *Brown v. Perkins*, 12 Gray, 89; *Willis v. Sproule*, 13 Kansas, 257; *Beach v. Schoff*, 28 Penn. St. 195; *Owens v. State*, 52 Ala. 400; *Hopkins v. Crombie*, 4 N. H. 520; *State v. Anthoine*, 40 Maine, 435; *Lincoln v. Chadbourne*, 56 Maine, 197; *Earp v. Lee*, 71 Ill. 193; *Rung v. Shoneberger*, 2 Watts, 23; *Selman v. Wolfe*, 27 Texas, 68; *James v. Hayward*, Cro. Car. 184; *Harrington v. Edwards*, 17 Wis. 586; *Williams v. Fink*, 18 Wis. 265; *King v. Sanders*, 2 Brev. (S. C.) 111; *Dimmett v. Eskridge*, 6 Munf. 308.

⁴ *Arundel v. McCulloch*, 10 Mass. 70.

⁵ *Renwick v. Morris*, 3 Hill, 621; 7 Hill, 575; *Coates v. New York*, 7 Cowen, 558, 600; *Mills v. Hall*, 9 Wend. 315; *Burnham v. Hotchkiss*, 14 Conn. 310, 317; *Gunter v. Geary*,

1 Cal. 462; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 566; *Knox v. Chaloner*, 42 Maine, 150; *McLean v. Mathews*, 7 Brad. (Ill.) 599; *State v. Parrott*, 71 N. C. 311; *Gates v. Blincoe*, 2 Dana, 158; *Gray v. Ayres*, 7 Dana, 375; *Brubaker v. Paul*, Ibid. 428; *Manhattan Manuf. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Hale, De Portibus Maris*, c. 7; *Hargrave's Law Tracts*, 87, 88; *Harvey v. Dewoody*, 18 Ark. 252; 4 Black. Com. 167; *Bac. Abr. tit. Nuisance*, 6; *Com. Dig. tit. Action on the Case for Nuisance*, D. 4. See *Williams v. Blackwell*, 32 L. J. Ex. 174; *Tarrar v. Nunamaker*, 5 Rich. (S. C.) 484. In Virginia, a court of equity may restrain the threatened abatement of a mill dam, on the ground of obstructing the navigation, until the right to maintain the dam is decided. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

⁶ *Earp v. Lee*, 71 Ill. 193; *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148; *Mohr v. Gault*, 10 Wis. 513; *Smart v. Commonwealth*, 27 Gratt. 950, 953. *Contra*, that all necessary force may be used to effect a passage when resistance is made, see *Brubaker v. Paul*, 7 Dana, 428.

sarily or wantonly, thereby injuring property which is so placed as to constitute a common nuisance, but which does not interfere with the reasonable prosecution of his voyage.¹ So a private individual cannot abate the nuisance to a greater extent than is necessary to effect a passage,² and is liable for doing an unnecessary injury, and he cannot convert to his own use the materials of which the structure is composed.³ "This right and power," says Shaw, C. J.,⁴ "is never

¹ *Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 Q. B. 870; *Davies v. Mann*, 10 M. & W. 545; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Eastern Railway Co. v. Doring*, 5 C. B. N. s. 821; *Rady v. London Railway Co.*, 1 App. Cas. 754; *L. R.* 10 Ex. 100; 9 *Ibid.* 71; *Roberts v. Rose*, *L. R.* 1 Ex. 82; 3 H. & C. 162; *Cobb v. Bennett*, 75 Penn. St. 326; *The C. D. Jr.*, 1 Newb. Adm. 501; *Norris v. Litchfield*, 35 N. H. 271; *Kerwacker v. Cleveland Railroad Co.*, 3 Ohio St. 172; *Lovett v. Salem Railroad Co.*, 9 Allen, 557; *Pilcher v. Hart*, 1 Humph. 524; *Smart v. Commonwealth*, 27 Gratt. 950, 953.

² *Ibid.*; *Bird v. Holbrook*, 4 Bing. 628; *Hicks v. Dorn*, 42 N. Y. 47, 52; *Ely v. Supervisors*, 36 N. Y. 297; *Blodgett v. Syracuse*, 36 Barb. 529; *Harrower v. Ritson*, 37 Barb. 301; *Griffith v. McCullum*, 46 Barb. 561; *Dyer v. Dupri*, 5 Whart. 587; *Goldsmith v. Jones*, 43 How. Pr. 415; *Northrop v. Burrows*, 10 Abb. Pr. 365; *Owens v. State*, 52 Ala. 400; *State v. Moffet*, 1 G. Greene, 247; *Moffett v. Brewer*, 1 G. Greene, 348; *Morrison v. Marquardt*, 24 Iowa, 35; *Brown v. Chadbourne*, 31 Maine, 9; *Dwinel v. Veazie*, 44 Maine, 167; *Veazie v. Dwinel*, 50 Maine, 479, 496; *Prescott v. Williams*, 21 Pick. 241; *Gates v. Blincoe*, 2 Dana, 158; *Graves v. Shattuck*, 35 N. H. 257; *Hopkins v. Crombie*, 4 N. H. 520; *Philiber v. Matson*, 14 Penn. St. 306; *Beach v. Schoff*, 28 Penn. St. 195.

See *Criswell v. Clugh*, 3 Watts, 330; *Dimmett v. Eskridge*, 6 Munf. (Va.) 308.

³ *Larson v. Furlong*, 50 Wis. 681; *State v. Taylor*, 27 N. J. L. 117.

⁴ *Brown v. Perkins*, 12 Gray, 89, 101. A city, charged with the duty of preventing obstructions to navigation, may abate them as nuisances. *Hart v. Albany*, 9 Wend. 571. But the city must be prepared to show that a nuisance actually exists. *Yates v. Milwaukee*, 10 Wall. 497; *Evansville v. Martin*, 41 Ind. 145. A person is not precluded, by abating a nuisance, from bringing an action for the damages which he has previously sustained thereby. *Gleason v. Gary*, 4 Conn. 420; *Pierce v. Dart*, 7 Cowen, 609; *Lansing v. Smith*, 4 Wend. 9; *Hudson River R. Co. v. Loeb*, 7 Rob. 418; *Call v. Buttrick*, 4 Cush. 345. Nor, after an action has once accrued for obstructing a right of way, does an offer by the defendant to remove the obstruction deprive the plaintiff of his right to damages occurring prior to the offer. *Green v. Caulk*, 16 Md. 556. But the defendant is only liable for damages prior to the suit. *Hopkins v. Western Pacific Railroad Co.*, 50 Cal. 191. In *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245, a corporation claimed the right to abate a mill-dam as a nuisance to the navigation of a stream; and, it appearing that such abatement would cause great loss to the mill-owner and inconvenience to the public, it was held

entrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance." The rule supported by the weight of authority appears to be that an individual cannot abate a public nuisance unless he suffers some special damage, not common to the rest of the public, entitling him to maintain an action.¹ If the abatement is lawful, the intent in making it is immaterial. Thus a person who has a right to pass from a highway to navigable waters may remove, with as little injury as possible, a fence which obstructs his right of passage, although his purpose may be to commit a nuisance by filling up the creek.² Where a building was unlawfully erected in tide water in front of certain villa lots, it was held that the owner of the lots had no right to abate it, either upon the ground that the building was unsightly and diminished the saleable value of the lots by interfering with the prospect therefrom, or because the access to the lots by water was thereby made less convenient, it not appearing that their owner or any other person had approached or had occasion to approach them from the water, or that the building wholly prevented such access.³

§ 129. In *Gibbons v. Ogden*,⁴ the Supreme Court of the United States decided in 1824 that the word "commerce,"

that a court of equity had jurisdiction to prevent the intended abatement until the right to maintain the dam was decided.

¹ Authorities cited above, notes 1-4. *Larson v. Furlong*, 50 Wis. 687; *Barnes v. Racine*, 4 Wis. 454; *Greene v. Nunnemacher*, 36 Wis. 50; *Brown v. Perkins*, 12 Gray, 89; *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497; *Great Falls Co. v. Worster*, 15 N. H. 438; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Clark v. St. Clair Ice Co.*, 24 Mich. 508; *Finley v. Hershey*, 41 Iowa, 389; *McGregor v. Boyle*, 34 Iowa, 268; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Rogers v. Rogers*, 14 Wend. 131;

Wetmore v. Tracey, 14 Wend. 250; *Griffith v. McCullum*, 46 Barb. 561; *Harrower v. Ritson*, 37 Barb. 301; *Goldsmith v. Jones*, 43 How. Pr. 415.

² *Harvard College v. Stearns*, 15 Gray, 1.

³ *Bowden v. Lewis*, 13 R. I. 189; 23 Alb. L. J. 492.

⁴ 9 Wheat. 1; *Veazie v. Moore*, 14 How. 568, 573; *Brown v. Maryland*, 12 Wheat. 419; *Lord v. Steamship Co.*, 102 U. S. 541; *Railroad Co. v. Richmond*, 19 Wall. 584; *New York v. Miln*, 11 Peters, 102; *The License Cases*, 5 How. 504; *Cooley v. Board of Wardens*, 12 How. 299; 1 Kent Com. 439.

as employed in the Constitution, is not limited to trade or traffic, but includes the navigation of rivers, bays, and harbors of the several States, and the intercourse between nations or citizens connected with such navigation; that this constitutional power is not limited by the external bounds of a State, but extends to the interior thereof in favor of citizens of other States, but not in cases between citizens of the particular State, or between different parts of the same State which are not accessible from other States; and that the exclusive power to regulate commerce between the States is vested in Congress. In the important case of *Pennsylvania v. Wheeling Bridge Co.*,¹ decided in 1851 by the same court, it appeared that under a statute of the State of Virginia a bridge had been erected across the Ohio River, having but a single span, about 980 feet in length, without draws or openings, and that steamboats or sail vessels could not pass under it at all states of the water. Congress had previously regulated navigation upon this river by licensing vessels, establishing ports of entry, and imposing duties on masters of vessels, and had approved the compact between the States of Virginia and Kentucky, which provided that the navigation of the river should be free and common to all citizens of the United States. It was held that the Ohio was a navigable stream, subject to the commercial power of Congress, and that the action of Congress respecting the river excluded State legislation; and the bridge was ordered to be removed unless the defendants should open an unobstructed passage for vessels by a day named. It was held that this might be done by erecting a bridge which, for the space of 300 feet over the channel of the river, should have an elevation of 111 feet above low-water mark.² It being subsequently agreed by the parties that a draw which was deemed of sufficient width by the court might be constructed over the western channel of the river, the bridge, as constructed over the main or eastern channel, was permitted to stand,³ and a subsequent act of Congress, declaring the bridge a law-

¹ 13 How. 518; 18 How. 421.

³ 13 How. pp. 577, 619, 627.

² 13 How. p. 578.

ful structure, was held to be valid.¹ In *People v. Kelly*,² the Court of Appeals of New York held that Congress could authorize the construction of the suspension bridge across the East River, between the cities of New York and Brooklyn, although it would, to some extent, interfere with the navigation; that the determination of Congress, as to the extent of the interference which would be permitted, was conclusive; that Congress might devolve upon the Secretary of War the power to approve or prescribe the plan for the bridge; that the Secretary of War could convey the notification in any way that would be effectual, and that notice of approval, given through one of his subordinates, was sufficient. In *United States v. Duluth*,³ it was held that the action of Congress, in making appropriations for the improvement of the navigation between Lake Superior and Superior Bay, was sufficient to preclude State legislation authorizing a canal for the improvement of Duluth harbor, which would seriously interfere with the work of the general government, the engineers of the war department, who had the control of the appropriations, being of the opinion that the work authorized by them at the mouth of the St. Louis River was the true mode of improving the entrance to Superior Bay, in which was the harbor of Duluth. The United States may restrain by injunction those who act under State authority from so floating logs, or doing other acts as to seriously injure its improvements of navigation.⁴ But the courts will not interfere in cases where it does not appear that acts done under such authority will prevent the carrying into effect of legislation by Congress for the survey and improvement of a navigable river.⁵

¹ 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; 1 Woolw. 150; *South Carolina v. Georgia*, 93 U. S. 4; *Baird v. Shore Line Railroad Co.*, 6 Blatch. 276, 461; *Northern Pacific Railroad Co. v. Barnesville Railroad Co.*, 2 McCrary, 224; *St. Louis v. Knapp Co.*, Id. 516; *Newport Bridge Co. v. United States*, 105 U. S. 470.

² 76 N. Y. 475; *Miller v. New York*, 18 Blatch. 212.

³ 1 Dillon, 469; *Wisconsin v. Duluth*, 96 U. S. 379; 2 Dillon, 406.

⁴ U. S. *v. Rum River Boom Co.*, 1 McCrary, 397; *U. S. v. Mississippi River Boom Co.*, Id. 601.

⁵ *U. S. v. Beef Slough Manuf. Co.*, 8 Biss. 421.

§ 130. State legislation is also upheld which authorizes bridges and similar obstructions upon navigable streams ; and the commercial power vested in Congress extends over the commercial waters of a State only as regards intercourse with foreign nations, or with other States of the Union.¹ In *Willson v. Blackbird Creek Marsh Co.*,² decided in 1829, it appeared that the State of Delaware had authorized the building of a dam across the Blackbird Creek, a small stream, in which the tide ebbed and flowed, and that the defendants, being the owners of a sloop regularly enrolled and licensed according to the navigation laws of the United States, tore down the dam for the purpose of effecting a passage. It was held that the State had power to authorize the dam in the absence of any action by Congress in execution of the power to regulate commerce, and that the defendants were trespassers. The opinion was delivered by Marshall, C. J., who said: "The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are preserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States to 'regulate commerce with foreign nations, and

¹ The Passenger Cases, 7 How. 266, 275; *Sears v. Warren Co.*, 36 Ind. 283; *Case of the State Freight Tax*, 367.
15 Wall. 232; *The Bright Star*, Woolw. ² 2 Peters, 245.

among the several States.' If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question." This decision was declared by the court in *The Wheeling Bridge Case*¹ not to be in conflict with the conclusions there reached. Its authority has been maintained upon the ground that it did not appear that the defendants' vessel was bound to a port of entry above the dam, or that there was such a port above the dam;² but it is more frequently regarded as supporting the doctrine that the States are free to legislate with respect to their internal waters so long as the superior power of Congress remains dormant.³ In *Gilman v. Philadelphia*,⁴ a bridge thirty feet above the waters of the Schuylkill River, a tidal stream entirely within the State of Pennsylvania, was about to be erected, with no draw or opening, under the authority of

¹ 13 How. 518, 566.

² *Per* Hunt, J., in *Silliman v. Troy and West Troy Bridge Co.*, 11 Blatch. 274, 287; *People v. Rensselaer Railroad Co.*, 13 Wend. 113, 135.

³ *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 566; *The Passenger Cases*, 7 How. 397; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *County of Mobile v. Kimball*, 102 U. S. 691, 700; *Hall v. De Cuir*, 95 U. S. 485, 488, 516; *People v. Rensselaer Railroad Co.*, 15 Wend. 113, 135; *Miller v. New York*, 13 Blatch. 469, 475; *Baird v. Shore Line Railway Co.*, 6 Blatch. 276; *United States v. New Bedford Bridge*,

1 Wood. & M. 407; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 231; *Craig v. Kline*, 65 Penn. St. 399; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532, 552; *Norris v. Boston*, 4 Met. 282, 296; *Dunham v. Lamphere*, 3 Gray, 268, 273; *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 389, 395; *Cox v. State*, 3 Blackf. (Ind.) 193, 197; *Savannah v. Georgia*, 4 Ga. 26, 41; *Kellogg v. Union Co.*, 12 Conn. 7; *Ex parte Crandall*, 1 Nev. 294, 310; *Dover v. Portsmouth Bridge*, 17 N. H. 200, 226; *State v. Dibble*, 4 Jones (N. C.) 107, 112.

⁴ 3 Wall. 713.

the State. There was already a bridge over the stream, about 500 feet lower down, which had stood for many years, and by which all commerce, except that of low coal barges, had been long excluded from the river, but the legality of which was not drawn in question. The plaintiff, who was a citizen of another State, was the owner of valuable dock property on the river above the proposed bridge and not the owner or navigator of a vessel having a coasting license. The majority of the court¹ maintained the legality of the proposed structure, holding, upon the authority of *The Blackbird Creek Case*, that, as Congress had not acted on the precise subject, the State had concurrent jurisdiction over it, but expressly denying² that the fact that the Schuylkill River lay within a single State affected the power of Congress over it. In the case of *The Passaic Bridges*,³ also, it was said that the police power of a State extends to the closing of navigation upon a tidal river lying wholly within its own territory, by means of a bridge or dam. The acts of Congress which authorize vessels to engage in the coasting trade within a State are construed as not indicating an intention by Congress to interfere with the power of the State to obstruct its navigable waters, but only to authorize navigation upon them by coasting vessels while they are navigable.⁴

§ 131. In *Pound v. Turck*,⁵ the question presented was as to the validity of a statute of Wisconsin which authorized

¹ In the dissenting opinion of Mr. Justice Clifford, which was concurred in by Justices Wayne and Davis, it was maintained that Congress had regulated navigation on the waters in question.

² 3 Wall. 724, 725; *The Daniel Ball*, 10 Wall. 557, 564; *The Montello*, 20 Wall. 430.

³ 3 Wall. 782, 793.

⁴ *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawyer, 127; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 565; *Silliman v. Troy and West Troy Bridge Co.*, 11 Blatch. 274, 287; *De-*

voe v. Penrose Ferry Bridge Co., 3 Am. Law Reg. 79; 5 Penn. Law Jour. 313; *United States v. New Bedford Bridge*, 1 Wood. & M. 401, 419; *Milor v. New Jersey Railroad Co.*, 6 Am. L. Reg. 6; *Pennsylvania Railroad Co. v. New York Railroad Co.*, 18 Int. Rev. Rec. 142. See *The Passaic Bridges*, 3 Wall. 782, 793; *Kellogg v. Union Co.*, 12 Conn. 7, 27; *Thames Bank v. Lovell*, 18 Conn. 500; *Washington Bridge Co. v. State*, 18 Conn. 53, 65.

⁵ 95 U. S. 459. See, also, *County of Mobile v. Kimball*, 102 U. S. 691, 700. The State may authorize dams

the construction of dams at a given point across the Chippewa River, a navigable stream, and also the building of booms with sufficient piers to stop and hold all logs and other things which might float in said river. The statute provided that the dams and booms should be so constructed as not to obstruct the running of lumber rafts in the river. In delivering the opinion of the court, Mr. Justice Miller said: The principle established is "that, in regard to the powers conferred by the commerce clause of the constitution, there are some which by their essential nature are exclusive in Congress, and which the States can exercise under no circumstances; while there are others which from their nature may be exercised by the State until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject. Of this class are pilotage and other port regulations;¹ bridges across navigable streams;² and as especially applicable to the case before us to erect dams across navigable streams."³ . . . "The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are, within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats; but whose greatest value in water-carriage is as outlets to saw-logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best

in navigable rivers for other purposes than the improvement of the navigation. *State v. Eau Claire*, 40 Wis. 533.

¹ *Cooley v. Board of Wardens*, 12 How. 299.

² *Gilman v. Philadelphia*, 3 Wall. 713.

³ *Willson v. Blackbird Creek Co.*, 2 Peters, 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Crandall v. Nevada*, 6 Wall. 35.

reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

§ 132. There are three cases in which authority from the legislature is necessary to erect a bridge across a stream: First, where the stream is navigable; second, where the State owns the bed of the stream; and third, where the right to take toll is desired.¹ Impassable obstructions may be authorized by a State upon either tidal or fresh-water streams within its limits and navigable to coasting vessels, while the power conferred upon Congress to regulate commerce remains dormant and unexercised by legislation upon the subject;² and the mere grant of commercial power, anterior to any action of Congress under it, is not, in this respect, exclusive of State authority.³ Even when an impassa-

¹ Fort Plain Bridge Co. v. Smith, 30 N. Y. 44.

² Willson v. Black Bird Creek Co., 2 Peters, 245; Withers v. Buckley, 20 How. 84; Pound v. Turck, 95 U. S. 459; Hall v. De Cuir, 95 U. S. 485, 488, 516; Wisconsin v. Duluth, 96 U. S. 379; Wisconsin v. Eau Claire, 40 Wis. 533. A grant by the State of the right to erect a dam in a navigable river is subject to the rights of a prior grantee. Union Canal Co. v. Landis, 9 Watts. 228. But the right of the State to widen the draw of a bridge which it owns is not impaired by a previous grant to a street railway corporation to run its cars over the bridge, and the fact that the cars will be temporarily interrupted. Middlesex Railroad v. Wakefield, 103 Mass. 261. In Pennsylvania a statutory license to the owners of lands adjoining such a stream to erect dams or water-works is subordinate to the right of the State to grant the water

to a navigation company. Monongahela Navigation Company v. Coons, 6 Watts. & S. 101; Susquehanna Canal Co. v. Wright, 9 Watts. & S. 9.

³ Ibid.; County of Mobile v. Kimball, 102 U. S. 691, 699, 700; Silliman v. Hudson River Bridge Co., 4 Blatch. 74, 395, 409; 1 Black, 582; 2 Wall. 403; Henderson v. New York, 92 U. S. 259, 272; Minot v. Philadelphia Railroad Co., 2 Abb. (U. S.) 323, 338; Woodman v. Kilbourn Manuf. Co., 1 Biss. 546; United States v. New Bedford Bridge, 1 Wood. & M. 401; Ingraham v. Chicago Railroad Co., 34 Iowa, 249; *Ex parte* Crandall, 1 Nev. 294, 310; Western Union Telegraph Co. v. Atlantic Telegraph Co., 5 Nev. 102, 106; Dover v. Portsmouth Bridge, 17 N. H. 200; Parker v. Cutler Mill-dam Co., 20 Maine, 353; State v. Portland Railroad Co., 57 Maine, 402; Lee v. Pembroke Iron Co., 57 Maine, 481; Moor v. Veazie, 32 Maine, 343; Brown v. Chadbourne, 21 Maine, 9;

ble structure like a dam might be removable as obstructing inter-state commerce, a bridge, erected under authority from a State, which, having draws or openings, affords opportunity for vessels to pass, but which limits the navigation, at a point below where the coasting trade is carried on by licensed vessels, to the space occupied by the draw or opening, would not be condemned,¹ although additional precautions in pass-

Rogers v. Kennebec Railroad Co., 35 Maine, 319; *Knox v. Chaloner*, 42 Maine, 150; *Treat v. Lord*, Id. 552; *State v. Freeport*, 43 Maine, 198; *Veazie v. Dwinel*, 50 Maine, 479; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Plecker v. Rhodes*, 30 Gratt. 795.

¹ *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 577, 619, 627; 18 How. 421; *The Passaic Bridges*, 3 Wall. 782; *Gilman v. Philadelphia*, 3 Wall. 713; *Mississippi Railroad Co. v. Ward*, 2 Black, 485; *Atlee v. Packet Co.*, 21 Wall. 389, 395; *Crandall v. Nevada*, 6 Wall. 35; *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 74, 395; 1 Black, 582; 2 Wall. 403; *Silliman v. Troy & West Troy Bridge Co.*, 11 Blatch. 274; *Mississippi Railroad Co. v. Ward*, 2 Black, 485; *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237; *Works v. Junction Railroad*, 5 McLean, 425; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Columbus Ins. Co. v. Curtin*, Ibid. 209; *Columbus Ins. Co. v. Peoria Bridge Co.*, Ibid. 70; *Hood v. Dighton Bridge*, 3 Mass. 263; *People v. Rensselaer Railroad Co.*, 15 Wend. 113, 134; *Commonwealth v. Breed*, 4 Pick. 460; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Middlesex Railroad Co. v. Wakefield*, 103 Mass. 265; *Commonwealth v. Taunton*, 7 Allen, 309, 312; *Talbot County v. Queen Anne's County*, 50 Md. 245; *Easton v. New York Railroad Co.*, 30 Leg. Int. 124; *People v. St. Louis*, 5 Gilman, 351, 550; *Illinois River Packet Co. v.*

Peoria Bridge Co., 38 Ill. 467; *Chicago v. McGinn*, 51 Ill. 266; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508, 516; *Joliet Railroad Co. v. Healy*, 94 Ill. 416; *Hodgman v. St. Paul Railroad Co.*, 23 Minn. 153; 20 Minn. 48; *Flanagan v. Philadelphia*, 42 Penn. St. 219, 232; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Attorney General v. Hudson River Railroad Co.*, 1 Stock. 526; *Attorney General v. New York Railroad Co.*, 24 N. J. Eq. 49; *Attorney General v. Stevens*, Sax. (N. J.) 370; *Tucker v. Burlington Co.*, Ibid. 282; *Allen v. Monmouth Co.*, 2 Beas. 68; *Stevens v. Erie Railway Co.*, 6 C. E. Green, 259; *Attorney General v. Paterson Railroad Co.*, 9 N. J. Eq. 526; *Trenton Water Power Co. v. Raff*, 36 N. J. 335; *Stephens Co. v. Central Railroad Co.*, 34 N. J. L. 280; *Rogers v. Kennebec Railroad Co.*, 35 Maine, 319; *State v. Freeport*, 43 Maine, 198; *State v. Portland Railroad Co.*, 57 Maine, 402; *Moor v. Veazie*, 32 Maine, 343; 31 Maine, 360; 14 How. 568; *County Commissioners v. County Commissioners*, 50 Md. 245; *Wisconsin Improvement Co. v. Manson*, 43 Wis. 255; *New Haven Toll Bridge Co. v. Bunnell*, 4 Conn. 54; *Jones v. Pettibone*, 2 Wis. 308; *Depew v. Wabash & Erie Canal*, 5 Ind. 8; *Niederhauser v. State*, 28 Ind. 257; *Williams v. Beardsley*, 2 Ind. 591; *Terre Haute Bridge Co. v. Halliday*, 4 Ind. 36; *Cobb v. Smith*, 16 Wis. 661; 3 Am. Law Reg. 1; *Hoelt v. Seaman*, 38 N. Y. S. C. 62; *Ex parte Water Commissioners*, 3 Edw. Ch. 290; *Selman v. Wolfe*, 27 Texas, 68;

ing it may be required on the part of vessels, or temporary delays may be thereby caused to navigators. A bridge so authorized, having a sufficient opening, or being of sufficient height, at the usual state of the water or of ordinary freshets,¹ to permit the passage of any vessel capable of navigating the stream, will not be condemned as interfering with the powers of Congress, even in cases where Congress has regulated navigation upon the river;² and the legislature of a State may empower persons or corporations to erect and maintain bridges without draws over its navigable waters, as well as dams, if the statute giving such power does not interfere with the regulations of Congress on the same subject.³ Such authority will be a protection from indictment brought upon

Hudson v. Cuero Land Co., 47 Texas, 56; *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 389; *Heerman v. Beef Slough Co.*, 1 Fed. Rep. 145; 8 Biss. 334; *Commissioners v. Withers*, 29 Miss. 21; *Eldridge v. Cowell*, 4 Cal. 80; *Dyer v. Tuscaloosa Bridge*, 2 Porter, 296; *Avery v. Fox*, 1 Abb. (U. S.) 246. In *Parker v. Cutler Mill-dam Co.*, 20 Maine, 355, a statute authorizing the defendant to maintain a mill-dam on their own land across the head of a harbor, with flood-gates so as to admit the passage of boats at high water, was held to be constitutional.

¹ See *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518.

² *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Mississippi Railroad Co. v. Ward*, 2 Black, 485; *Middle Bridge Co. v. Marks*, 26 Maine, 326; *President v. Trenton City Bridge Co.*, 13 N. J. Eq. 46; *State Bridge Co. v. Metz*, 5 Dutcher, 122; 2 Vroom, 378; 3 Id. 199; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Crosby v. Hanover*, 36 N. H. 404; *Cornish Bridge v. Richardson*, 8 N. H. 207; *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631; *State v. Mutchler*, 42 N. J. L. 461; *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544; *State v. Boston Railroad Co.*, 25 Vt. 433; *Ohio Railroad Co. v. Wheeler*, 1 Black,

286, 297. A corporation may be legally organized in one State for the purpose of building a bridge across a river which forms the boundary between that State and another State. *Hunt v. Kansas Bridge Co.*, 11 Kansas, 412. Towns are under no duty, and have no power to bridge streams flowing between the State in which they are situated and an adjoining State. *Abendroth v. Greenwich*, 27 Conn. 363.

³ *Commonwealth v. Taunton*, 7 Allen, 309; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, 347; *Davidson v. Boston Railroad*, 3 Cush. 91, 106; *Thayer v. New Bedford Railroad*, 125 Mass. 255; *State v. Freeport*, 43 Maine, 198; *Pennsylvania Railroad Co. v. New York Railroad Co.*, 23 N. J. Eq. 157. See *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Brown v. Commonwealth*, 3 Serg. & R. 273; *Wisconsin v. Eau Claire*, 40 Wis. 533; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Attorney General v. Eau Claire*, 37 Wis. 400. If, in an action for obstructing a navigable river, a legislative grant, authorizing the erection of a dam is introduced in defence, this does not raise a question of title. *Browne v. Schofield*, 8 Barb. 239.

the ground that the structure is a public nuisance,¹ and is valid, although no indemnity is provided for those who have been accustomed to navigate in the waters which are thereby enclosed.² And, apart from State legislation, an act of Congress, passed either before or after the erection of the structure, authorizing an obstruction, or even a termination, of the navigation, renders it not obnoxious to the commerce clause of the Constitution, since the power thereby vested in Congress includes both the right to declare what is and what is not an illegal obstruction in a navigable stream, and the power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction from one channel or part of a river to another.³ The combined action of Congress and of the State or States interested would legalize impediments to the right of passage over any navigable waters.⁴ In the case of boundary rivers between States, legislation by both States is necessary to authorize obstructions.⁵

§ 133. The effect of that provision of the Ordinance of 1787, which declares the navigable waters leading into the Mississippi and St. Lawrence to be common highways and forever free, has been the subject of much discussion with respect to its present operation as a restraint upon the power

¹ *Ibid.*; *Stoughton v. State*, 5 Wis. 291; *Harris v. Thompson*, 9 Barb. 350; *People v. New York Gaslight Co.*, 64 Barb. 55; 6 Lans. 467; *Phoenix v. Commissioners*, 12 How. Pr. 1; 1 Abb. Pr. 466. It is the province of the legislature to determine whether the benefit to logging interests and to commerce, arising from the erection of dams, piers, and booms, will counterbalance the inconvenience they will necessarily cause to navigation by vessels. *Heerman v. Beef Slough Co.*, 8 Biss. 334.

² *Ibid.*; *Commonwealth v. Breed*, 4 Pick. 460; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

³ *Gilman v. Philadelphia*, 3 Wall. 713, 724; *Pennsylvania v. Wheeling*

Bridge Co., 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; 1 Woolw. 150; *South Carolina v. Georgia*, 93 U. S. 4; *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 503, 517; *Miller v. New York*, 13 Blatch. 469; *Baltimore Railroad Co. v. Wheeling Transportation Co.*, 32 Ohio St. 116; *Richmond v. Dubuque Railroad Co.*, 33 Iowa, 422.

⁴ *Ibid.*; *Miller v. New York*, 13 Blatch. 469; *People v. Kelly*, 5 Abb. N. Cas. 383, 440; *Baltimore Railroad Co. v. Wheeling Transportation Co.*, 32 Ohio St. 116.

⁵ *Rutz v. St. Louis*, 2 McCrary, 344; *Quincy Bridge Co. v. Adams Co.*, 88 Ill. 615.

of Congress or of the State legislatures to pass laws not assented to by both, which authorize impediments to the free navigation of the rivers within its scope. In Ohio it is held that the ordinance is in the nature of a perpetual compact;¹ but that State laws for the improvement of the rivers for hydraulic purposes, and laws which authorize bridges causing equal inconvenience to citizens of Ohio and of other States, are not within its meaning.² In Indiana it is held that the ordinance was superseded by the Federal Constitution, but that it has been so far recognized and adopted, with respect to navigable streams, by subsequent acts of Congress, that it has the force of a subsisting law of the United States, and that the total obstruction of these streams by dams or otherwise is illegal.³ In Wisconsin the adoption and ratification of the State Constitution have been held to operate as a repeal of the ordinance, so far as its provisions are in conflict with that Constitution.⁴ In certain cases in the Supreme Court of the United States, it was held

¹ See *Columbus Ins. Co. v. Curtin*, 6 McLean, 209; *Jolly v. Terre Haute Drawbridge Co.*, Id. 237; *Columbus Ins. Co. v. Peoria Bridge Co.*, Id. 70; *Spooner v. McConnell*, 1 McLean, 337; *Palmer v. Cuyahoga County*, 3 McLean, 226; *Lewis v. Baird*, Id. 56; *Astrow v. Hammond*, Id. 107; *Vaughan v. Williams*, Id. 530; *Jones v. Van Zandt*, 2 McLean, 611.

² *Hogg v. Zanesville Canal Co.*, 5 Ohio, 419; *Hutchinson v. Thompson*, 9 Ohio, 52; *Gavit v. Chambers*, 3 Ohio, 496; *Hickok v. Hine*, 23 Ohio St. 523, 527; *Symonds v. Cincinnati*, 14 Ohio, 147; *Kramer v. Chicago Railroad Co.*, 5 Ohio St. 140; *Hubbard v. Toledo*, 21 Ohio St. 379; *Guthrie v. McConnell*, 2 McVey's Ohio Dig. 343, pl. 8.

³ *Cox v. State*, 3 Blackf. 193, 200; *Depew v. Board of Trustees*, 5 Ind. 8, 11; *Johnson v. Chambers*, 12 Ind. 102; *Crake v. Crake*, 18 Ind. 156; *Williams v. Beardsley*, 2 Ind. 591; *Terre Haute Drawbridge Co. v. Halliday*, 4 Ind. 36; *Commissioners v. Pidge*, 5 Ind.

13; *Neadlerhauser v. State*, 28 Ind. 257, 266; *Chandler v. Douglass*, 8 Blackf. 10, 12; *Tyrrell v. Lockhart*, 3 Id. 136. See, also, *Illinois River Packet Co. v. Peoria Bridge Association*, 38 Ill. 467; *Chicago v. McGinn*, 51 Ill. 266, 271; *People v. St. Louis*, 5 Gilman, 351, 368; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 308, 515; *Phoebe v. Jay*, 1 Scam. 207; *Peters v. New Orleans Railroad Co.*, 56 Ala. 528, 535.

⁴ *Connecticut Mutual Ins. Co. v. Cross*, 18 Wis. 109. See *Newcomb v. Smith*, 1 Chand. 71; *Stoughton v. State*, 5 Wis. 291; *Cobb v. Smith*, 16 Wis. 661; *Enos v. Hamilton*, 24 Wis. 658; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *State v. Eau Claire*, 40 Wis. 533; *Attorney General v. Eau Claire*, 37 Wis. 400; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Milwaukee Gaslight Co. v. The Gamecock*, 23 Wis. 144.

that other provisions of this ordinance were superseded by the adoption of the Federal Constitution, and that its provisions, so far as they have been preserved, owe their validity and authority to that Constitution and to the Constitutions and laws of the respective States.¹ The ordinance clearly does not deprive the State of power to obstruct bayous and sloughs, not useful for inter-state commerce;² to improve the navigation;³ or to grant ferry licenses.⁴ If the ordinance is an existing law, it would deprive the new States of such power as the original States possess to terminate navigation, and would so limit the powers of Congress that the assent of the States interested would be necessary to validate its action. "If," says Miller, J.,⁵ "the ordinance were obligatory in every particular, and not altered by common consent nor superseded by the Constitution of the United States, the States embraced within the north-western territory could not have been admitted into the Union on an equality with the other States, which is a fundamental principle of the Constitution, the basis of this Union."

§ 134. A bridge or dam, erected in navigable waters and not sanctioned by any statute, is indictable as a public nuisance,⁶ even though the structure is shown to be of public

¹ See *Strader v. Graham*, 10 How. 82; *Pollard v. Hagan*, 3 How. 212; *Parmoli v. First Municipality*, Id. 589; 7 Op. At. Gen. 571; *Menard v. Aspasia*, 5 Peters, 505; *Dred Scott v. Sandford*, 19 How. 393, 490; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 162.

² *Ingraham v. Chicago Railroad Co.*, 34 Iowa, 249.

³ *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Attorney General v. Eau Claire*, 37 Wis. 400; *Commissioners v. Pidge*, 5 Ind. 13; *Williams v. Beardsley*, 2 Ind. 591; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155; *Lorman v. Benson*, 8 Mich. 18, 26; *Commissioners v. Withers*, 29 Miss. 41.

⁴ *Fanning v. Gregoire*, 9 How. 534;

Conway v. Taylor, 1 Black, 603, 634; *Chapin v. Crusen*, 31 Wis. 209; *State v. New Orleans Navigation Co.*, 11 Martin, 309, 323; *Chiapella v. Brown*, 14 La. Ann. 189; *Marshall v. Grimes*, 41 Miss. 27; *Wiggins Ferry Co. v. East St. Louis*, *Chicago Legal News* (1882), p. 228.

⁵ *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 162.

⁶ *Reg. v. Betts*, 16 Q. B. 1022, 1037; *State v. Freeport*, 43 Maine, 198, 201; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *People v. Vanderbilt*, 26 N. Y. 287; 38 Barb. 282; *Blanchard v. Western Union Telegraph Co.*, 60 N. Y. 510; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158, 166; *State v. Dibble*, 4 Jones (N. C.) 107; *State v. Parrott*,

convenience and utility.¹ A State cannot declare that a bridge, constructed without a draw, is not an obstruction to inter-state communication, and the question whether it is a material obstruction can only be determined in the courts of the United States.² When Congress has exercised its power to regulate navigation, its authority is paramount, and excludes or supersedes State legislation upon the same subject.³ An obstruction to navigation authorized by a State may become a nuisance, and liable to be removed under the subsequent action of Congress.⁴ When authority from the State is adequate to legalize such an obstruction, it is not necessary that compensation be provided,⁵ but the requirements of the statute conferring such authority must be fully observed, in order that it may afford the protection. A statute authorizing a partial obstruction of the navigation will not protect an impediment not contemplated by the statute, but any excess or irregularity in the exercise of the power, by which the navigation is impaired, becomes a nuisance *pro tanto*.⁶ Where a railway company was empowered

71 N. C. 311; *Barnes v. Racine*, 4 Wis. 454; *Walker v. Shepardson*, 2 Wis. 384; *Yates v. Judd*, 18 Wis. 118; *Potter v. Menasha*, 30 Wis. 492; *Newark Plank Road Co. v. Elmer*, 1 Stock, 754, 788; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Works v. Junction Railroad*, 5 McLean, 425.

¹ *Ante*, § 94.

² *Ibid.*; *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Miller v. New York*, 13 Blatch. 469; *United States v. Milwaukee Railroad Co.*, 5 Biss. 410, 420.

³ *Ante*, § 129; *Willson v. Blackbird Creek Marsh Co.*, 2 Peters, 245; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; 18 How. 421; *Pound v. Turck*, 95 U. S. 459; *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 74, 395; 1 Black, 582; 2 Wall. 403; *United States v. Duluth*, 1 Dillon, 469; *Works v. Junction Railroad Co.*, 5 McLean, 425; *United States v. Milwaukee Railroad Co.*, 5 Biss. 410; *United States v. Railroad Bridge*, 6

McLean, 518; *South Carolina v. Georgia*, 93 U. S. 4; *Wisconsin v. Duluth*, 96 U. S. 379, 387.

⁴ *Ibid.*; *Gibbons v. Ogden*, 9 Wheat. 196; *The Passenger Cases*, 7 How. 283, 394; *People v. Brooks*, 4 Denio, 469; *Sturgis v. Spoifford*, 45 N. Y. 446; *Henderson v. Spoifford*, 59 N. Y. 131; *Ex parte McNeil*, 13 Wall. 236; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 244; *Sherlock v. Alling*, 93 U. S. 99.

⁵ *Sugar Refining Co. v. Jersey City*, 11 C. E. Green, 247; *Glover v. Powell*, 2 Stock. 211. The legislature may indirectly sanction a bridge over navigable waters; and where it authorizes a town to buy a bridge, this amounts to a declaration that the bridge is legal. *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337.

⁶ *Renwick v. Morris*, 3 Hill (N. Y.) 621; 7 *Ibid.* 575; *Blanchard v. Western Union Telegraph Co.*, 60 N. Y. 510; *State v. Freeport*, 43 Maine, 198; *Knox v. Chaloner*, 42 Maine,

by act of Parliament to construct a swing bridge across a navigable stream, and the act provided that it should not be lawful to keep the bridge closed so as to obstruct the navigation for a longer time than was sufficient to enable those ready to use the bridge to cross it, and for opening it to admit vessels, it was held that the company was liable in damages to the owner of a vessel detained by reason of a defective construction of the bridge, which prevented it being opened, and that the company was not relieved of the duty to preserve the navigation by the fact that it had employed a contractor to build the bridge in conformity with the provisions of the act.¹ Where a way was authorized to be located across a tidal creek, by a statute of the State of Maine, which provided that it should be a bridge with a suitable draw, and subject to the approval of the harbor commissioners of Portland, a location which made no mention of a bridge or draw and was not approved by the harbor commissioners, was held to be unauthorized and void.²

§ 135. Statutes providing for the erection of drawbridges, or of dams with sluices or locks, over navigable waters, are construed strictly, like all public grants, and in favor of the pre-existing right of navigation.³ If the act provides for a

150; *State v. Dibble*, 4 Jones (N. C.) 107, 115; *State v. Parrott*, 71 N. C. 311; *Healy v. Joliet Railroad Co.*, 2 Brad. (Ill.) 435; *Hickok v. Hine*, 23 Ohio St. 523; *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410; *State v. Bell*, 5 Porter, 365; *Newark Plank Road Co. v. Elmer*, 1 Stock. 790. See *White v. King*, 5 Leigh, 726; *Ottawa v. People*, 48 Ill. 233; *Korah v. Ottawa*, 32 Ill. 121; *Harlem v. Emmert*, 41 Ill. 319; *Van Wageningen v. Newark Plank Road Co.*, 1 Stock. 754; 4 Hal. Ch. 586; *Allen v. Monmouth Co.*, 2 Beas. 68; *Attorney General v. New York Railroad Co.*, 9 C. E. Green, 59. If the location of a bridge over a navigable stream be changed without authority, it becomes a public nuisance. *Allen v. Monmouth*, 2 Beas. 68, 73.

¹ *Hole v. Sittingbourne Railway Co.*, 6 H. & N. 488; *Wiggins v. Bodington*, 3 C. & P. 544; *Attorney General v. Mid Kent Railway Co.*, L. R. 3 Ch. 100; *Attorney General v. Furness Railway Co.*, 38 L. T. N. S. 555. See *Terre Haute Drawbridge Co. v. Halliday*, 4 Ind. 36; *Patterson v. Proprietors*, 40 Maine, 404; *Cuff v. Newark Railroad Co.*, 6 Vroom, 17, 574; *Jones v. Chantry*, 1 Hun, 613; 4 Sup. Ct. 63; *Davis v. Jenkins*, 5 Jones (N. C.) 290.

² *Cape Elizabeth v. County Commissioners*, 64 Maine, 456.

³ *Commonwealth v. Breed*, 4 Pick. 460, 464; *State v. Freeport*, 43 Maine, 198; *Attorney General v. Hudson River Railroad Co.*, 9 N. J. Eq. 526; *Commonwealth v. Church*, 1 Penn. St. 105; *Hickok v. Hine*, 23 Ohio St. 523,

draw but does not designate its size, it will not be held that the legislature intended the draw to be insufficient for the convenience of the navigation.¹ One who is authorized to erect a bridge over navigable water, with a draw not less than fifteen feet wide, is not required to make the draw wider than fifteen feet, although vessels of a greater breadth have been accustomed to sail in such water.² But under an act of incorporation authorizing the building of a bridge across a navigable river, "with two suitable draws which shall be at least thirty feet wide," the company is bound not only to make the draws sufficiently wide to accommodate navigation at the time of their construction, but, if rendered necessary by an increase in the size of vessels, or a difference in their mode of construction, or from any other cause, to so enlarge the draws from time to time as to permit the passage of any vessels having occasion to pass the bridge.³ So a provision in an act authorizing a dam across a navigable

531; *State v. Godfrey*, 12 Maine, 361; *Mason v. Boom Co.*, 3 Wall. Jr. 252; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq. 754; *Dugan v. Bridge Co.*, 27 Penn. St. 303; *Selman v. Wolfe*, 27 Texas, 68; *Minturn v. Lisle*, 4 Cal. 181; *Barnes v. Racine*, 4 Wis. 454; *United States v. New Bedford Bridge*, 1 Wood. & M. 401; *Healy v. Joliet Railroad Co.*, 2 Brad. (Ill.) 435; *Nelson v. St. Croix Boom Co.*, 52 Wis. 647. Power given to a railroad company to construct the road "along" a river will not be extended by implication to authorize its construction in or upon the river, or below high-water mark of tide water. *Stevens v. Erie Railway Co.*, 21 N. J. Eq. 259; *Stevens v. Paterson R. Co.*, 34 N. J. L. 532. See *Abraham v. Great Northern Railway Co.*, 16 Q. B. 586; *Van Wagenen v. Newark Plank Road Co.*, 4 Hal. Ch. 586; 1 Stock. 754; *Attorney General v. Stevens*, Sax. 570. So authority to construct a boom along the banks or across a branch of a river does not give the right to maintain booms across the

entire river. *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; 44 Wis. 295; *Plummer v. Penobscot Lumber Association*, 67 Maine, 363.

¹ *Baltimore v. Stoll*, 5 Md. 435.

² *Commonwealth v. Breed*, 4 Pick. 460. A corporation empowered by the legislature to maintain a mill-dam "on their own land" across the head of a harbor, with flood-gates thereto at least fifteen feet wide, so as to admit the passage of gondolas and boats at high water, may erect the dam below high-water mark at the head of the harbor, and across a part of the channel where the tide ebbs and flows; and the words "on their own land" merely exclude the inference that the lands of others may be taken. *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353.

³ *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, 352; *Dugan v. Bridge Co.*, 27 Penn. St. 303. See *New Haven Toll Bridge Co. v. Bunell*, 4 Conn. 54; *Middlesex Railroad Co. v. Wakefield*, 103 Mass. 261; *Dow v. Wakefield*, Id. 267.

river, which required "a good and sufficient slide, that will admit the passage of all such rafts as may navigate said river," was construed as referring to such rafts as might navigate the river after its condition was improved by the dam.¹ Where the charter of a railroad company authorized it to bridge a navigable stream, provided that the navigation of the stream should not be thereby obstructed, a temporary obstruction, caused by the necessary framework and scaffolding used in erecting the bridge, was held to be an obstruction within the meaning of the proviso, for which the company was liable to any person injured thereby.² A charter granted to a bridge company, requiring a "convenient draw" in the bridge, is violated if the draw cannot be passed without danger or vexatious delay.³ A charter which authorizes the building of a dam across a navigable channel, with the proviso that it be "so constructed as to leave the channel of the river as safe and convenient for the descent of rafts as it now is," has been construed to mean the least obstruction of navigation consistent with the uses of the dam for the purpose contemplated by the charter.⁴ Where the draw of a bridge across navigable waters is required to be of a certain width, the measurement cannot be made along the line of the bridge if it is built diagonally across the river.⁵ If a statute authorizes the erection of a bridge with piers, in such manner as not "to injure, stop, or interrupt the navigation," but does not fix the number and location of the piers, the State may complain if the piers are so injudiciously located as to obstruct

¹ *Volk v. Eldred*, 23 Wis. 410. This was an action for injuries to a raft caused by obstructions at a dam. It was held no defence that the raft could not have navigated the river at all before the dam was built.

² *Memphis & Ohio Railroad Co. v. Hicks*, 5 Sneed, 427. So, of repairs. *Lister v. Newark Plank Road Co.*, 36 N. J. Eq. 477.

³ *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237; *Attorney General v. New York Railroad Co.*, 9 C. E. Green, 49; *Proprietors v. Hoboken Land Co.*, 2 Beas. 504; *New Haven*

Toll Bridge Co. v. Bunnell, 4 Conn. 58. A city which is required by statute to maintain a bridge as a public highway, is not liable for the detention of a vessel caused by the draw of the bridge not being of the prescribed width, or by the neglect of the superintendent of the bridge, unless such liability is expressly created by statute. *French v. Boston*, 129 Mass. 592.

⁴ *Whitaker v. Delaware Canal Co.*, 87 Penn. St. 34.

⁵ *Missouri River Packet Co. v. Hannibal Railroad Co.*, 1 McCrary, 281.

the navigation, but the owner of a vessel which is injured thereby, although entitled to recover damages for a wanton abuse or negligent exercise of the discretion thus confided to the builders of the bridge, cannot maintain an action for a mere error of judgment in locating the piers.¹ In general, the erection of a bridge over navigable waters, with or without a draw, by authority of the legislature, is a regulation of a public right, and not the deprivation of any private right, which can be a ground for damages to individuals.²

§ 136. Corporate charters, so far as they contain unqualified grants, are contracts which the State cannot constitutionally impair, alter, or repeal; and it is incompetent for the legislature, having once empowered persons or corporations to maintain a bridge which necessarily causes an obstruction to the navigation, to amend the act by making such persons or corporations liable for the obstruction.³ Even where a charter reserved to the legislature the right of modification after the corporators should be repaid their expenses in building the bridge, an amendment before such payment, requiring the construction of a draw fifty feet wide,

¹ *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Clarke v. Birmingham Bridge Co.*, 41 Penn. St. 147; *Dugan v. Monongahela Bridge Co.*, 27 Penn. St. 303; 1 Pitts. 404; *Coon v. Monongahela Navigation Co.*, 6 Penn. St. 382; *Board of Wardens v. Philadelphia*, 43 Penn. St. 209; *Bacon v. Arthur*, 4 Watts, 437; *Plummer v. Alexander*, 2 Jones, 81; *Chestnut Hill Turnpike Co. v. Rutter*, 4 S. & R. 4; *Henry v. Bridge Co.*, 8 Watts & S. 27; *Delaware Canal Co. v. Torrey*, 33 Penn. St. 150; *Stephens Transportation Co. v. Central Railroad Co.*, 34 N. J. L. 280; 33 Id. 229; *Attorney General v. New York Railroad Co.*, 24 N. J. Eq. 49; *Attorney General v. Hudson River Railroad Co.*, 1 Stock. 526; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Turnpike Road Co. v. Campbell*, 44 Cal. 89.

² *Ibid.*; *Davidson v. Boston Railroad*, 3 Cush. 91, 106; *Blackwell v. Old Colony Railroad*, 122 Mass. 1; *Thayer v. New Bedford Railroad*, 125 Mass. 253; *Ely v. Rochester*, 26 Barb. 133; *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *Pound v. Turck*, 95 U. S. 459; *Kearns v. Cordwainers' Co.*, 6 C. B. N. s. 388.

³ *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 389; *Commonwealth v. Pennsylvania Canal Co.*, 66 Penn. St. 41; *Angell & Ames on Corporations*, §§ 31, 767; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 48; *Derby Turnpike Co. v. Parks*, 10 Conn. 541; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 173; *Enfield Toll Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 55; *Bronson v. Taylor*, 33 Conn. 116.

in place of one thirty-two feet wide, was held to be unconstitutional and void.¹ If the legislature authorizes a dam or other obstruction to be erected across a navigable stream situated within the State, the person erecting the structure under such authority is not subject to a prosecution for maintaining a public nuisance, nor can the obstruction be abated as such by reason of the fact that the health of the neighborhood is thereby impaired, or that other injuries, not involving the direct appropriation of property, result to persons residing in the vicinity.² Nor does the fact that a bridge or dam, which is built with draws or locks in strict compliance with its charter, becomes at a subsequent period impassable to vessels, from causes not attributable to the proprietor, — such as low water, or sand-bars across the channel, or fallen trees or wrecks, — render the proprietor liable, at least before there has been time to repair, for the loss of the navigation or injuries sustained from these causes, in the space to which he has limited the navigation.³ If the legislature authorizes a dam across a navigable river, with the proviso that it shall be so constructed as not to substantially obstruct the navigation, an injunction will not be granted by the courts, in advance of the construction of the dam, on the ground that the proposed structure must necessarily obstruct the navigation.⁴ As against the riparian owners, a charter which authorizes the erection of a toll-

¹ *Washington Bridge Co. v. State*, 18 Conn. 53.

² *Neaderhauser v. State*, 28 Ind. 257; *Depew v. Board of Trustees*, 5 Ind. 8; *Butler v. State*, 6 Ind. 165; *Stoughton v. State*, 5 Wis. 291; *Barnes v. Racine*, 4 Wis. 494; *Harris v. Thompson*, 9 Barb. 350; *People v. Law*, 34 Barb. 514; *Williams v. New York Central Railroad Co.*, 18 Barb. 222; *Clark v. Syracuse*, 13 Barb. 32. A public improvement, like a canal, erected under authority from the State, is not a public or private nuisance, because it renders the neighborhood unhealthy, except where the water is permitted to escape and form

stagnant and noisome pools on the adjoining lands. *Commonwealth v. Reed*, 34 Penn. St. 275; *Delaware Canal Co. v. Commonwealth*, 60 Penn. St. 367; *Steele v. Western Inland Lock Navigation*, 2 Johns. 283.

³ *Board of Commissioners v. Pidge*, 5 Ind. 13; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 625; *Roush v. Walter*, 10 Watts, 86; *Plumer v. Alexander*, 12 Penn. St. 81.

⁴ *Wisconsin v. Eau Claire*, 40 Wis. 533; *Attorney General v. Eau Claire*, 37 Wis. 400; *Woodman v. Kilbourn Manuf. Co.*, 1 Abb. (U. S.) 158; *United States v. Ruggles*, 5 Blatch. 35.

bridge across a river, does not authorize taking the land of such owners at the side of the bridge for the purpose of a toll-house; and in the land which is covered by the bridge it creates only an easement.¹ An act of the legislature, giving an unqualified authority to construct a bridge or dam across a stream, is a justification only with respect to public interests. It gives, by implication, authority to appropriate, without compensation, such portion as is necessary for the purpose of the lands belonging to the State, under water.² But it affords no protection for a private injury, such as the overflow of lands belonging to the riparian owners,³ or the building of piers and abutments on lands under water belonging to individuals,⁴ without payment or tender of compensation. If one railroad corporation constructs its road across the track of another railroad corporation, the latter is entitled to damages, although its track is laid upon piles over tide water.⁵

§ 137. It is not necessary for the legislature to give a special and direct sanction to the erection or continuance of every bridge across navigable water, but such authority may

¹ *Thompson v. Androscoggin Bridge*, 5 Greenl. 62.

² *Pennsylvania Railroad Co. v. New York Railroad Co.*, 23 N. J. Eq. 157; *Attorney General v. Hudson Tunnel Co.*, 27 N. J. Eq. 176, 573; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532. See *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 25.

³ *Trenton Water Power Co. v. Raff*, 7 Vroom, 335; *Delaware Canal Co. v. Lee*, 22 N. J. L. 243; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. L. 200; *Brown v. Cayuga Railroad Co.*, 12 N. Y. 486; *Cott v. Lewiston Railroad Co.*, 36 N. Y. 214; *Turner v. Blodgett*, 5 Met. 210; *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Thatcher v. Dartmouth Bridge*, 18 Pick. 501; *Eastman v. Amoskeag Manf. Co.*, 44 N. H. 143; *Hooker v. New Haven Co.*, 14 Conn. 147; *Denslow v. New Haven*

Co., 16 Conn. 103; *Crittenden v. Wilson*, 5 Cowen, 165; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Baltimore Railroad Co. v. Reaney*, 42 Md. 117; *Thien v. Voegtlander*, 3 Wis. 461. See *Dodd v. Williams*, 3 Mo. App. 278.

⁴ *Morris Canal Co. v. Jersey City*, 26 N. J. Eq. 294; *Gunter v. Geary*, 1 Cal. 462; *State v. Glenn*, 7 Jones (N. C.) 321; *Cornelius v. Glenn*, Id. 512. The owner may maintain trespass *quare clausum* for an unlawful invasion of land covered by water. *Ibid.* *Smith v. Ingraham*, 7 Ired. (N. C.) 175; *Champlain Railroad Co. v. Valentine*, 19 Barb. 484; *People v. Mauran*, 5 Denio, 389; *Walker v. Shepardson*, 4 Wis. 486.

⁵ *Grand Junction Railroad Co. v. Middlesex Commissioners*, 14 Gray, 553; *Fitchburg Railroad v. Boston & Maine Railroad*, 3 Cush. 58.

be granted by implication.¹ An act, for example, which authorizes a town to purchase and maintain an existing bridge over a navigable stream, is a legislative recognition of the legality of the bridge, and of the right of the town to maintain it.² If the charter of a railroad corporation contains a general authority to erect bridges and all other works necessary for the construction of the road, it includes, by implication, the power to bridge a navigable river on the route of such road.³ The same is true of an unrestricted grant of authority to construct a railroad from one designated point to another, when the road cannot be reasonably constructed without crossing a navigable stream.⁴

§ 138. It is competent for the State legislature to establish wharf or harbor lines, and to empower commissioners to license wharves and piers extending to such lines.⁵ Such statutes do not conflict with the commercial power of Congress, so long as the latter remains unexercised;⁶ they do not impair the right to maintain wharves lawfully erected before their passage,⁷ nor are they unconstitutional, as appropriating private property to public uses without compensation, even in those States in which the shores of tide waters to low-water mark are the private property of the riparian owners.⁸

¹ *Fall River Iron Works v. Old Colony Railroad*, 5 Allen, 221; *Boston Water Power Co. v. Boston Railroad*, 23 Pick. 360.

² *Castello v. Landwehr*, 28 Wis. 522; *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337.

³ *Attorney General v. Stevens*, Sax. (N. J.) 370; *Union Pacific Railroad Co. v. Hall*, 91 U. S. 343, 350; *People v. Saratoga Railroad Co.*, 15 Wend. 130; *Mohawk Bridge Co. v. Utica Railroad Co.*, 6 Paige, 554; *Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63; *Miller v. Prairie du Chien Railway Co.*, 34 Wis. 533.

⁴ *Fall River Iron Works v. Old Colony Railroad*, 5 Allen, 221.

⁵ *State v. Sargent*, 45 Conn. 358.

⁶ *Savannah v. State*, 4 Ga. 26.

⁷ *Commonwealth v. Alger*, 7 Cush. 53; *Garey v. Ellis*, 1 Cush. 306; *Attorney General v. Boston & Lowell Railroad Co.*, 118 Mass. 345. See *Yates v. Milwaukee*, 10 Wall. 497; *Martin v. Evansville*, 32 Ind. 85; *Martin v. O'Brien*, 34 Miss. 21.

⁸ *Commonwealth v. Alger*, 7 Cush. 53; *Garey v. Ellis*, 1 Cush. 306; *State v. Sargent*, 45 Conn. 358. But see *Walker v. Shepardson*, 4 Wis. 486. A city authorized by the legislature to establish dock and wharf lines in a river, and to prevent obstructions to the navigation thereof, cannot by ordinance declare a private wharf a nuisance and order its abatement as obstructing the navigation, if in fact it is not a nuisance. *Yates v. Milwaukee*, 10 Wall. 497.

The mere establishment of a harbor line is not an abandonment of the title of the State to the tide waters within the line.¹ The statutes of some of the States establishing these lines restrain the littoral proprietors from extending wharves beyond high-water mark without the authority of the legislature, or a license from the harbor commissioners,² while those of other States expressly grant the privilege to occupy and fill out to the prescribed limits,³ — a privilege which has been held to accrue to the ownership of the upland, however such ownership has been acquired, but not to divest the title of the State to the space within the lines, until it has been actually occupied or filled.⁴ The case of levees located upon the margin of a river, or as near the river as is practicable for the purpose of reclaiming the adjoining lands, is governed

¹ *Weber v. Harbor Commissioners*, 18 Wall. 57; *Aborn v. Smith*, 12 R. I. 370; *Engs v. Peckham*, 11 R. I. 210; *Hardy v. McCullough*, 23 Gratt. 251; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *Attorney General v. Hudson Tunnel Co.*, 27 N. J. Eq. 176, 573; *Wilson v. Ingloes*, 11 Gill & J. 351; *Boston Steamboat Co. v. Munson*, 117 Mass. 34; *Yates v. Judd*, 18 Wis. 118; *People v. Broadway Wharf Co.*, 31 Cal. 33; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Kisling v. Johnson*, 13 Cal. 56; *Guy v. Harmance*, 5 Cal. 73; *Eldridge v. Cowell*, 4 Cal. 80; *Stone v. Elkins*, 24 Cal. 127; *Holladay v. Frisbie*, 15 Cal. 630; *Knight v. Haight*, 51 Cal. 169.

² *Commonwealth v. Alger*, 7 Cush. 53; *Attorney General v. Woods*, 108 Mass. 436; *Attorney General v. Boston & Lowell Railroad Co.*, 118 Mass. 345; *Attorney General v. Cambridge*, 119 Mass. 518; *Weber v. Harbor Commissioners*, 18 Wall. 57. If harbor commissioners, in letting a contract for the construction of a wharf, do not comply with the provisions of the statute from which their authority is derived, the contract is void. *Cowell v. Martin*, 43 Cal. 665; *People v. San*

Francisco Railroad Co., 35 Cal. 606; *People v. Klumpke*, 41 Cal. 263.

³ *Bailey v. Burges*, 11 R. I. 330; *Engs v. Peckham*, 11 R. I. 210; *Manchester v. Hudson*, cited 11 R. I. 224; *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348; *Aborn v. Smith*, 12 R. I. 370; 11 R. I. 594; *Clark v. Peckham*, 9 R. I. 455, 473; 10 R. I. 35; *Simmons v. Mumford*, 2 R. I. 172. See *People v. New York Ferry Co.*, 68 N. Y. 71; *In re City of Brooklyn*, 73 N. Y. 179; *People v. Vanderbilt*, 26 N. Y. 287; *Hart v. Albany*, 9 Wend. 571; *Hecker v. New York Balance Dock Co.*, 24 Barb. 215; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182, 184; *Winpenny v. Philadelphia*, 65 Penn. St. 135; *Norfolk City v. Cooke*, 29 Gratt. 430.

⁴ *Aborn v. Smith*, 12 R. I. 370; *Engs v. Peckham*, 11 R. I. 210. Under the New York statute of 1848, the owners of lands on the East River have not only the right to construct bulkheads and wharves to the water line established in 1836, but also title to the land under water to that line. *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70; *People v. Kelley*, 38 Barb. 269; 14 Abb. Pr. 372.

by similar rules. When actually constructed, under authority of the State legislature, such a levee becomes the conventional or artificial bank of the river, defining the line of high-water mark in those States in which riparian ownership is held limited by that line, and entitling the riparian proprietors to accretions subsequently added thereto.¹

§ 139. The legislature alone has the right to determine whether and to what extent the public convenience requires an interruption of the public right of navigation.² In the absence of direct authority, the subordinate authorities of a State, such as towns, surveyors of highways, or county commissioners, are not invested with power to obstruct navigable waters, whether fresh or salt, by constructing highways below high-water mark, or authorizing dams or bridges across them.³ In Massachusetts and other States, it is held that a general statutory authority to lay out roads and highways does not confer power to construct them across navigable waters or below the high-water mark, upon the ground that, navigable waters being of common right public highways, a general authority to lay out a new highway does not warrant the obstruction of a highway which is already in use by the public.⁴ In Connecticut such authority is held to authorize

¹ *Musser v. Hershey*, 42 Iowa, 356, 363; *New Orleans v. United States*, 10 Peters, 711. See *Barkley v. Levee Commissioners*, 93 U. S. 258; *The Police Jury v. Britton*, 15 Wall. 566; *Alcorn v. Hamer*, 38 Miss. 652; *Williams v. Cammack*, 27 Miss. 209; *Daily v. Swope*, 47 Miss. 367; *Vasser v. George*, *Ibid.* 713; *Smith v. Atlantic Railroad Co.*, 25 Ohio St. 91; *Wright v. Thomas*, 26 *Ibid.* 346.

² *Wales v. Stetson*, 2 Mass. 146; *Commonwealth v. Charlestown*, 1 Pick. 180; *Commonwealth v. Breed*, 4 Pick. 460; *Cape Elizabeth v. County Commissioners*, 64 Maine, 456.

³ *Commonwealth v. Coombs*, 2 Mass. 489; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charlestown*, 1 Pick. 180; *Commonwealth v.*

Breed, 4 Pick. 460; *Kean v. Stetson*, 5 Pick. 492; *Wellington, Petitioner*, 16 Pick. 87; *Charlestown v. Middlesex Commissioners*, 3 Met. 202; *Henshaw v. Hunting*, 1 Gray, 203; *Attorney General v. Cambridge*, 16 Gray, 247; *Boston v. Richardson*, 105 Mass. 365; *Commonwealth v. Gloucester*, 110 Mass. 491; *Dunbar v. Vinal*, 2 Dane Abr. 695; *State v. Anthoine*, 40 Maine, 435; *State v. Wilson*, 42 Maine, 9; *Attorney General v. Stevens*, Sax. (N. J.) 370; *Tucker v. Burlington Co.*, *Ibid.* 282; *Allen v. Monmouth*, 2 Beas. 68.

⁴ *Ibid.*; *Commonwealth v. Coombs*, 2 Mass. 489; *Arundel v. McCulloch*, 10 Mass. 70; *Wales v. Stetson*, 2 Mass. 143; *Commonwealth v. Charlestown*, 1 Pick. 180; *Springfield v. Connecti-*

by implication the construction of highways below high-water mark,¹ or bridges with draws across navigable streams.² In *Charlestown v. Middlesex Commissioners*,³ in Massachusetts, the legislature authorized a bridge to be built over a navigable stream, "either solid or on piles, leaving sufficient passage for the water," as certain commissioners might deem necessary. Under the direction of these commissioners the bridge was made solid for two-thirds of its length, and the other third, being on piles over the channel and deeper parts of the stream, afforded passage for small vessels without masts when loaded or empty. It was held that the stream was still navigable, and that the county commissioners were not authorized to locate a highway over it. In *Marblehead v. Essex Commissioners*,⁴ the county commissioners were held to have no jurisdiction to lay a highway along a beach forming the side of a harbor, which was not covered by the ordinary tides but by spring tides only, it appearing that the probable effect would be to lessen the usefulness of the harbor for the purpose of navigation, and to interfere with public measures for its protection and improvement. A highway may be located, without special authority from the legislature, over flats between the original high and low-water mark which have been lawfully reclaimed and filled up;⁵ and upon an indictment for creating a nuisance in a part of a town-way laid out by the side of navigable water

cut River Railroad Co., 4 Cush. 63; Commonwealth v. Alger, 7 Cush. 53; Commonwealth v. Roxbury, 9 Gray, 451, 493; Commissioners v. Holyoke Water Power Co., 104 Mass. 446, 449; Marblehead v. County Commissioners, 5 Gray, 453; Boston & Maine Railroad Co. v. Boston & Lowell Railroad Co., 124 Mass. 368, 371; United States v. New Bedford Bridge, 1 Wood. & M. 407; Simmons v. Mumford, 2 R. I. 172, 185.

¹ Groton v. Hurlburt, 22 Conn. 183; Weathersfield v. Humphrey, 20 Conn. 218; Clark v. Saybrook, 21 Conn. 313; Brown v. Preston, 33 Conn. 210;

Saugatuck Bridge Co. v. Westport, 39 Conn. 337, 350.

² Brown v. Preston, 33 Conn. 210.

³ 3 Met. 202. In *People v. Meach*, 14 Abb. Pr. n. s. 429, it was held that supervisors will not be restrained from erecting a bridge over a stream in which the tide ebbs and flows, if it is doubtful whether the stream could ever be navigated.

⁴ 5 Gray, 451.

⁵ Henshaw v. Hunting, 1 Gray, 203; Clement v. Burns, 43 N. H. 609; Attorney General v. Old Colony Railway, 12 Allen, 404.

and above high-water mark, it is not a defence that another part of the way is below high-water mark.¹

§ 140. The right to build out wharves or piers into public waters, as incident to the ownership of the adjoining land, is a riparian right, and, as such, will be considered in a subsequent chapter.² All such structures, as well as bridges, dams, and booms, which are not authorized by the legislature, or which are not erected in accordance with the authority conferred,³ are public nuisances so far as they interfere with the passage of vessels, or limit such passage to a portion of the navigable channel.⁴ But it is competent for the legislature to authorize their erection even beyond the point of navigability, and the reclamation of land from the water, for the encouragement of navigation and commerce, although

¹ *Commonwealth v. Weiher*, 3 Met. 445.

² *Post*, c. 5.

³ *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Commonwealth v. Nashua Railroad*, 2 Gray, 54; *Commonwealth v. Gloucester*, 110 Mass. 491.

⁴ *Williams v. Wilcox*, 8 Ad. & El. 314; *Dimes v. Petley*, 15 Q. B. 276; *Attorney General v. Terry*, L. R. 9 Ch. 423; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Atlee v. Packet Co.*, 21 Wall. 389; 2 Dill. 479; *State v. Freeport*, 43 Maine, 198; *Knox v. Chaloner*, 42 Maine, 150; *State v. Sturtevant*, 21 Maine, 9; *State v. Godfrey*, 24 Maine, 232; *People v. St. Louis*, 5 Gilman, 351; *Hogg v. Zanesville Manuf. Co.*, *Wright (Ohio)* 139; *Clark v. Lake*, 1 Scam. 229; *Porter v. Allen*, 8 Ind. 1; *Olson v. Merrill*, 42 Wis. 203; *Attorney General v. Eau Claire*, 37 Wis. 400; *Walker v. Shepardson*, 2 Wis. 384; 4 Wis. 486; *Barnes v. Racine*, 4 Wis. 454; *Yates v. Judd*, 18 Wis. 118; *In re Eldred*, 46 Wis. 530; *Newark Plank Road Co. v. Elmer*, 1 Stock. 754, 790; *Commonwealth v. Church*, 1 Penn. St. 105;

Hart v. Albany, 9 Wend. 571; 3 Paige, 213; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; *Moore v. Commissioners*, 32 How. Pr. 184; *Attorney General v. Stevens*, Sax. (N. J.) 370; *Tucker v. Burlington Co.*, *Ibid.* 282; *Allen v. Monmouth Co.*, 2 Beas. 68; *Atkinson v. Philadelphia Railroad Co.*, 14 Haz. Pa. Reg. 10; *Dimmett v. Eskridge*, 6 Munf. 308; *State v. Dibble*, 4 Jones (N. C.) 107; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Rhodes v. Otis*, 33 Ala. 578; *South Carolina Railroad Co. v. Moore*, 23 Ga. 398; 24 Ga. 418; *Gold v. Carter*, 9 Humph. 369; *Commonwealth v. Knowlton*, 2 Mass. 530; *Borden v. Vincent*, *24 Pick. 301; *Franklin Wharf Co. v. Portland*, 67 Maine, 46; *Plankroad Co. v. Elmer*, 9 N. J. Eq. 754; *People v. Gutches*, 48 Barb. 656; *Selman v. Wolfe*, 27 Texas, 63; *Sherlock v. Bainbridge*, 41 Ind. 35; *Morrison v. Thurman*, 17 B. Mon. 249; 14 Id. 371; *Macon Railroad Co. v. Pate*, 50 Ga. 156; *State v. Meritt*, 35 Conn. 314; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Enos v. Hamilton*, 24 Wis. 658; 27 Wis. 256.

the effect may be to confer privileges which are wholly private and exclusive in their nature.¹

§ 141. Hindrances to navigation, and the necessity for legislative sanction to legalize them, may also arise by the exaction of charges and tolls from those who navigate the sea or public rivers. It is a principle of the common law that no man can take a settled and constant toll, even on his own private land, for a common passage without the king's license.² Nor is a grant from the Crown sufficient for this purpose, unless some benefit is shown to the community at large which forms a just consideration.³ "If," says Hale, C. J., "any man will prescribe for a toll upon the sea, he must allege a good consideration; because by Magna Charta and other statutes every one has a right to go and come upon the sea without impediment."⁴ The ownership of the soil of an arm of the sea, which is not a port, does not support a claim for tolls, even on the ground of immemorial usage, from those who, in the usual course of navigation,

¹ *Ante*, § 122; Phipp's Appeal, 28 Md. 380; Mayor v. State, 4 Ga. 26; Martin v. O'Brien, 34 Miss. 21; Yaddin Navigation Co. v. Benton, 2 Hawks (N. C.) 10; Cottrill v. Myrick, 12 Maine, 222; Hannibal v. Winchell, 54 Mo. 172; Frisbie v. McClemin, 33 Cal. 568; Templeton v. Coburn, 48 Cal. 563; Eldridge v. Cowell, 4 Cal. 41; Rush v. Jackson, 24 Cal. 308; Stevens v. Walker, 15 La. Ann. 577; Pontchartrain Railroad Co. v. Orleans Navigation Co., 15 La. Ann. 404; Delaware Canal Co. v. Lawrence, 2 Hun, 163; Hoeft v. Seaman, 38 N. Y. Sup. Ct. 62; Jeffersonville v. Louisville Ferry Co., 27 Ind. 100; Bingham v. Doane, 9 Ohio, 165; Snyder v. Rockport, 6 Ind. 237. Under a charter by which the construction of a railroad is authorized "to the place of shipping lumber" on a navigable river, the road may be extended into the water to a convenient point for shipment. Peavey v. C. Railroad Co., 30 Maine, 498.

² Hale, De Jure Maris, c. 3; Hargrave's Law Tracts, -10, 46, 73, 78.

³ Haspurt v. Wills, 1 Mod. 47; 1 Sid. 454; 1 Vent. 71; 2 Keb. 624, 665; Warren v. Prideaux, Ibid. 104; Vinkersterne v. Ebdon, 1 Salk. 248; 1 Ld. Raym. 384; Juxon v. Thornhill, Cro. Car. 132; Hill v. Smith, 4 Taunt. 520; Falmouth v. George, 5 Bing. 286; Brett v. Beales, 10 B. & C. 508; Gann v. Whitstable Free Fishers, 11 H. L. Cas. 192; Heddy v. Wheelhouse, Cro. Eliz. 558; Nottingham v. Lambert, Willes, 111; Exeter v. Warren, 5 Q. B. 773; Kingston Docks v. La Marche, 8 B. & C. 42; Jenkins v. Harvey, 1 C. M. & R. 877; 1 Gale, 23. See Woolrych on Waters, 299, 303; Gunning on Tolls, *passim*; Coulson & Forbes on Waters, c. 9.

⁴ Warren v. Prideaux, 1 Mod. 105; Woolrych on Waters, 237; Matson v. Scobell, 4 Burr. 2258; Juxon v. Thornhill, Cro. Car. 132.

exercise there the common rights of passage and anchorage.¹ The making of a port is, however, a consideration for toll;² so is the keeping of a capstan and rope necessary to assist vessels;³ the maintenance of lights, beacons, or buoys;⁴ the cleansing of a river;⁵ the repairing of a port,⁶ or the liability to repair the same, in case repairs are not needed.⁷ And the right to collect such a charge, within the limits of a port, may be acquired by prescription.⁸ In *Foreman v. Whitstable Free Fishers*,⁹ the respondents' claim to anchorage dues was maintained upon evidence of their ownership of the soil of the anchorage, of the maintenance of buoys and beacons, and

¹ *Gann v. Free Fishers*, 11 H. L. Cas. 193; 19 C. B. N. S. 802; *Colchester v. Brooke*, 7 Q. B. 339; *Woolrych on Waters*, 299; *Nottingham v. Lambert, Willes*, 111; *Wilkes v. Kirby*, 1 Lutw. 490; 2 *Ibid.* 519; *Com. Dig. tit. Toll Thorough, and Prerogative*, D. 48.

² *Ibid.*; *Vinkersterne v. Ebdon*, 1 Ld. Raym. 384; 1 Salk. 248; *Yarmouth v. Eaton*, 3 Burr. 1402; *Hale, De Jure Maris*, c. 3; *Hargrave's Law Tracts*, 51; *Exeter v. Warren*, 5 Q. B. 773; *Foreman v. Free Fishers*, L. R. 4 H. L. 281. See *London v. Hunt*, 2 Lev. 37; *Wilkes v. Kirby*, 2 Lutw. 1519; *Woolrych on Waters*, 300; *Topsell v. Ferrers*, Hob. 175; *London v. Hunt*, 3 Lev. 37.

³ *Falmouth v. George*, 5 Bing. 286; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 285.

⁴ *Ibid.*; *Foreman v. Whitstable Free Fishers*, L. R. 2 C. P. 688; L. R. 3 C. P. 586; L. R. 4 H. L. 266; *Trinity House v. Sorsbie*, 3 T. R. 768, n. (a); *Matson v. Scobell*, 4 Burr. 2258; *Poole v. Johnson*, 2 W. Bl. 764; *Woolrych on Waters*, 304; *Smithett v. Blythe*, 1 B. & Ad. 509; *Trinity House v. Clark*, 4 M. & S. 288; *Hamilton v. Stow*, 5 B. & A. 649; *Rex v. Jones*, 8 East, 451; *Trinity House v. Staples*, 2 Chitty, 689; *Vallego v. Wheeler*, *Cowper*, 143; *Rex v. Rebowe*, *Ibid.* 583; *Reg. v. Durham*, 2 El. & El. 230;

Rex v. Tynemouth, 12 East, 46; *Rex v. Coke*, 5 B. & C. 797.

⁵ *Ibid.*; *Haspurt v. Wills*, 1 Mod. 47; *King v. London*, 4 T. R. 21.

⁶ *Casher v. Holmes*, 2 B. & Ad. 592; *Jones v. Phillips*, 7 Ex. 85; *Wilson v. Robertson*, 4 El. & Bl. 923; *Ribble Navigation Co. v. Hargreaves*, 17 C. B. 385; *Harvey v. Lyme Regis*, L. R. 4 Ex. 260.

⁷ *Vinkersterne v. Ebdon*, 1 Salk. 248; 1 Ld. Raym. 384; 5 Mod. 359; *Yarmouth v. Eaton*, 3 Burr. 1402; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266; L. R. 3 C. P. 586; L. R. 2 C. P. 688.

⁸ *Woolrych on Waters*, 238, 305; *Exeter v. Warren*, 5 Q. B. 773; *London v. Hunt*, 3 Lev. 37; *Exeter v. Trimlet*, 2 Wils. 95; *Wilkes v. Kirby*, 2 Lutw. 1519; *Yarmouth v. Eaton*, 3 Burr. 1402; *Sargent v. Reed*, 2 Stra. 1228; 1 Wils. 91; *Colton v. Smith*, 1 Cowper, 47; *Falmouth v. George*, 5 Bing. 286; *Pelham v. Pickersgill*, 1 T. R. 660; *Richards v. Bennett*, 1 B. & C. 223; *Nottingham v. Lambert, Willes*, 111; *Foreman v. Free Fishers*, L. R. 4 H. L. 281; *Whitstable Free Fishers v. Foreman*, L. R. 2 C. P. 688; *Jenkins v. Harvey*, 1 Cr. M. & R. 877.

⁹ L. R. 4 H. L. 266; L. R. 3 C. P. 578; L. R. 2 C. P. 688. See *Aiton v. Stephen*, 1 App. Cas. 456; *Durham v. Bishopwearmouth*, 2 El. & El. 230.

the immemorial payment of tolls for merchandise and anchorage, these facts being held sufficient to warrant the inference that a port had once existed, although the place in question was not artificially formed, but was a natural roadstead, imposing no obligation on the owner to repair it and keep it accessible, so as to form a consideration for the toll demanded.

§ 142. In general, and especially in this country, where grants from the Crown and prescriptive rights of this character are comparatively unknown, a toll, being in the nature of a common charge upon the public, can be exacted for passing upon the sea or upon rivers only under the sanction of acts of the legislature.¹ Such acts will be effectual to enforce a toll anywhere within their operation.² The franchise of taking tolls upon public bridges and ferries is a part of the sovereign power reserved to the States and not delegated to the general government.³ But under the constitution and laws of the United States, the States or municipal corporations cannot impose taxes on vessels mooring at wharves or the banks of navigable rivers, except as a compensation for the advantage gained and the expense of maintaining them.⁴

¹ *Kingston Docks v. La Marche*, 8 B. & C. 42; *Wadsworth v. Smith*, 11 Maine, 278; *Olcott v. Banfill*, 4 N. H. 537; *State v. Olcott*, 6 N. H. 74; *McKee v. Grand Rapids Railway Co.*, 41 Mich. 274, 279; *Pennsylvania Railroad Co. v. National Railway Co.*, 8 C. E. Green, 441; *Camden Railroad Co. v. Briggs*, 2 Zab. 623; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Blake v. Winona Railroad Co.*, 19 Minn. 418; *Boykin v. Shaffer*, 13 La. Ann. 129; *Turnpike Co. v. Illinois*, 96 U. S. 63; *Bonaparte v. Camden Railroad Co.*, Bald. C. C. 205; *State v. Real Estate Bank*, 5 Ark. 595; *McPheeters v. Merimac Bridge Co.*, 28 Mo. 435; *Turnpike Road Co. v. Campbell*, 44 Cal. 89; *State v. Lake*, 8 Nev. 272. See *Reg. v. Salisbury*, 8 Ad. & El. 716.

² *Woolrych on Waters*, 299. A bridge company chartered by a single State cannot collect toll from a person who passes over a part of the bridge which is beyond the limits of the State, unless there is an express promise to pay. *Middle Bridge Co. v. Marks*, 26 Maine, 326; *South Carolina Railroad Co. v. Jones*, 4 Rich. Eq. (S. C.) 459; *Claremont Bridge Co. v. Royce*, 42 Vt. 730.

³ *Hudson v. State*, 3 Zab. 206; 4 Zab. 718.

⁴ *Cannon v. New Orleans*, 20 Wall. 579; *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, Id. 430; *Guy v. Baltimore*, Id. 434; *St. Martinsville v. The Mary Lewis*, 32 La. Ann. 1293; *New Orleans v. Wilmot*, 31 La. Ann. 65.

A riparian proprietor may open or improve an unnavigable stream, or excavate a canal, upon his own land and for his own accommodation, and refuse to permit others to use it without making compensation.¹ But the owner of either or both banks of a stream, although he may exclude the public therefrom and prohibit vessels and boats from landing thereon, could not maintain a public ferry,² a lock in aid of navigation,³ or a wharf,⁴ and collect a settled toll from all who use it, without prescription time out of mind, a charter from the king, or, in this country, the consent of the legislature. To establish a toll, the channel or passage must be open, for a fixed compensation, to the use of all who may have occasion to use it, and must have become such a common way, by the owner's consent, that he cannot maintain an action of trespass against those who use it and are willing to pay the prescribed toll.⁵ This general right, in favor of those paying toll, is, however, subject to reasonable limitations. If, for example, a company, authorized to construct a canal, is bound to keep it in good order, it doubtless has necessarily discretionary powers essential to regulate the canal and its naviga-

¹ Hale, *De Jure Maris*, c. 3; Hargrave's *Law Tracts*, 9, 10; Wadsworth v. Smith, 11 Maine, 278; Dwinel v. Barnard, 28 Maine, 554; Harvey v. Potter, 19 La. Ann. 264.

² *Post*, § 144; Mills v. St. Clair Co., 8 How. 581; Conway v. Taylor, 1 Black, 603; Pennsylvania Railroad Co. v. National Railway Co., 23 N. J. L. 441; Prosser v. Wapello Co., 18 Iowa, 327; Trustees v. Tatman, 13 Ill. 27; Nashville Bridge Co. v. Shelby, 10 Yerger, 280; McRoberts v. Washburne, 10 Minn. 23; Norris v. Farmers' Co., 6 Cal. 590; Henshaw v. Supervisors, 19 Cal. 150; Enfield Toll Bridge Co. v. Hartford Railroad Co., 17 Conn. 40, 64; Hartford Bridge Co. v. East Hartford, 16 Conn. 170; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 229; Fitch v. New Haven Co., 30 Conn. 39; Stark v. Miller, 3 Mo. 470; Young v. Harrison, 6 Ga. 130; Greer v. Hangabook, 47 Ga. 282;

Murray v. Menifee, 20 Ark. 561; Cloyes v. Keatts, 18 Ark. 19; Bell v. Clegg, 25 Ark. 26; Haynes v. Wells, 26 Ark. 464; Prosser v. Wapello County, 18 Iowa, 327; Pipkin v. Wynns, 2 Dev. (N. C.) 402. A grant from the State of land on a river, "with the appurtenances," conveys no right to maintain a public ferry. Harrison v. Young, 9 Ga. 359; 2 Black. Com. 38, 236.

³ Boykin v. Shaffer, 13 La. Ann. 129.

⁴ *Ante*, § 120.

⁵ Dwinel v. Barnard, 28 Maine, 554; Wood v. Truckee Turnpike Co., 24 Cal. 474; Walker v. Jackson, 10 M. & W. 161; Bonaparte v. Camden & Amboy Railroad Co., Bald. C. C. 205; Perrine v. Chesapeake Canal Co., 9 How. 172. See Boston & Roxbury Mill Dam v. Newman, 12 Pick. 476; Commonwealth v. Wilkinson, 16 Pick. 175.

tion, and, acting in good faith, may exercise these powers so as to exclude steamers if they injure the canal and impede the navigation.¹

§ 143. The provisions in State constitutions and bills of rights, prohibiting the taking of private property without due process of law or without compensation, do not impair the power of State legislatures to regulate compensation in the shape of tolls.² Nor are the States prevented by their constitutions, or by the commerce clause of the Federal constitution, in the absence of Congressional action thereunder, or by that prohibiting tonnage duties, from improving their rivers or delegating this power to others.³ State legislatures may determine the mode and extent of such improvements; may sanction the construction and maintenance of dams and locks upon navigable streams, or the removal of obstructions from the channel, for the purpose of improving the navigation or of facilitating the passage and collection of logs and rafts; and may authorize persons or corporations erecting such structures to collect reasonable tolls for the increased facilities thus afforded for public travel and transportation.⁴

¹ See *Sheldon v. New Orleans Canal Co.*, 9 Rob. (La.) 360.

² *Munn v. People*, 69 Ill. 80; *Munn v. Illinois*, 94 U. S. 113; *Burlington v. Beasley*, Id. 310; *Peik v. Chicago Railway Co.*, 94 U. S. 164; *Blake v. Winona Railroad Co.*, 19 Minn. 418; *Aborn v. Dubuque Mining Co.*, 48 Ill. 140, 141. See *Androscoggin Booms v. Haskell*, 7 Maine, 474; *Middlesex Turnpike Co. v. Freeman*, 14 Conn. 91.

³ *Withers v. Buckley*, 20 How. 84; *Thompson v. Androscoggin River Co.*, 58 N. H. 103; *Chicago v. McGinn*, 51 Ill. 263; *Carondelet Canal Co. v. Parker*, 20 La. Ann. 430; *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500; *Risley v. Farwell*, 4 Chand. (Wis.) 106; *Fali v. Sutter*, 21 Cal. 237; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 71; *Spring v. Russell*, 7 Maine, 273; *Moor v. Veazie*, 32 Maine, 343; 31 Maine, 360; 14 How. 538; *Knox v.*

Chaloner, 42 Maine, 156. Power reserved by the government to regulate tolls is not lost by non-user. *Chicago Railroad Co. v. Iowa*, 94 U. S. 155.

⁴ *Ibid.*; *Attorney General v. Eau Claire*, 37 Wis. 400; *Risley v. Farwell*, 4 Chand. (Wis.) 106; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Tewksbury v. Schulenberg*, 41 Wis. 584; 48 Wis. 577; *Wisconsin v. Eau Claire*, 40 Wis. 533; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; 44 Wis. 295; *Susquehanna Boom Co. v. Dubois*, 58 Penn. St. 182; *McKeen v. Delaware Division Canal Co.*, 49 Penn. St. 424; *White Deer Creek Improvement Co. v. Sassaman*, 67 Penn. St. 415; *Hart v. Hill*, 1 Whart. 136; *Boykin v. Shaffer*, 13 La. Ann. 129; *McReynolds v. Smallhouse*, 8 Bush, 447; *Simpson County Court v. Arnold*, 7 Bush, 354; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155; *People v. New York Ferry Co.*,

The privilege thus created is a franchise, and it is necessary to its validity that the grantee shall be certain. A statute which purported to grant the right to collect tolls upon logs floated in a navigable river, to any person or corporation which should improve the navigation of such river in the manner prescribed in the statute, is void for want of a certain grantee.¹ If the State, or its agents or grantees, in improving the navigation, takes, flows, or otherwise injures private property, compensation must be afforded therefor.² Statutes authorizing bridges, booms, and similar structures are not construed as authorizing the taking of the private property of riparian proprietors without their consent, further than is necessary to give a reasonable construction to the act.³ If a corporation is created "for making, laying, and maintaining side booms in suitable and convenient places in a river," it has no authority to enter upon private lands adjoining the river without the owner's consent.⁴ The State

68 N. Y. 71; Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462; Ryerson v. Utley, 16 Mich. 269; Plecker v. Rhodes, 30 Gratt. 795; Moor v. Veazie, 14 How. 568; 32 Maine, 343; 31 Maine, 360. As to improvements in a river by an improvement company beyond the State line, see Abbott v. Baltimore Steam Packet Co., 1 Md. Ch. Dec. 542. If a corporation for the improvement of a boundary river between States is chartered in both States, it may be sued in the State in which its principal place of business is, and its principal officers reside. Culbertson v. Wabash Navigation Co., 4 McLean, 544.

¹ Ibid.; Sellers v. Union Lumbering Co., 39 Wis. 525; Chenango Bridge Co. v. Paige, 83 N. Y. 178.

² Thompson v. Androscoggin River Co., 58 N. H. 108; Orr v. Quimby, 54 N. H. 590; Wood v. Nashua Manuf. Co., 5 N. H. 467; Lebanon v. Alcott, 1 N. H. 339; Moor v. Veazie, 31 Maine, 360; White Deer Creek Improvement Co. v. Sassaman, 67 Penn. St. 415; Sharpless v. Philadelphia, 21

Penn. St. 147, 170; Schuylkill Navigation Co. v. Freedley, 6 Whart. 109; Ten Eyck v. Delaware Canal Co., 18 N. J. L. 200; Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204; Cooper v. Williams, 5 Ohio, 391; Ryan v. Brown, 18 Mich. 196; Hamilton v. Fond du Lac, 40 Wis. 47; Alexander v. Milwaukee, 16 Wis. 247; Steele v. Western Inland Lock Navigation, 2 Johns. 283. See Chicago v. McGraw, 75 Ill. 566; Nash v. Upper Appomattox Co., 5 Gratt. 332; James River Co. v. Thompson, 3 Gratt. 270; Avery v. Police Jury, 12 La. Ann. 554; Walker v. Board of Public Works, 16 Ohio, 540. If the water at a public ford is raised by the dam of a navigation company chartered by the State so as to make the ford useless, the public right is restored upon the destruction of the dam. Crump v. Mims, 64 N. C. 767.

³ Hood v. Dighton Bridge, 3 Mass. 263; Thacher v. Dartmouth Bridge, 18 Pick. 501.

⁴ Perry v. Wilson, 7 Mass. 393.

or its grantees are not liable for remote or incidental injuries to individuals, caused by improving the navigation of those rivers which are public property,¹ or for injuries, however serious, which, being common to all others similarly situated, result from the regulation of the navigation.² Tolls may be authorized for the use of a stream, the navigation of which has been improved, but which was navigable in its natural condition, if such navigation is thereby facilitated.³

§ 144. The power of a corporation to demand toll, when chartered, like a canal company, for the purposes of public transportation, depends upon the terms of its charter and not upon the rules of the common law entitling the owner of property to demand such compensation and from such

¹ *Henly v. Lyme*, 5 Bing. 91; *Rex v. Pegham*, 5 B. & C. 350; *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794; *Lansing v. Smith*, 8 Cowen, 146; *Spring v. Russell*, 7 Greenl. 273; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353; *Moor v. Veazie*, 31 Maine, 360; *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *Tinsman v. Belvidere Delaware Railroad Co.*, 26 N. J. L. 148; *Hollister v. Union Co.*, 9 Conn. 436; *Hooker v. New Haven Co.*, 15 Conn. 323; *Alexander v. Milwaukee*, 16 Wis. 247; *Commonwealth v. Fisher*, 1 Penn. 462; *Hart v. Hill*, 1 Whart. 124, 136; *Zimmerman v. Union Canal Co.*, 1 Watts & Serg. 346; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 71; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9; *Bell v. McClintock*, 9 Watts, 119; *Bald Eagle Boom Co. v. Sanderson*, 81 Penn. St. (Pt. 2) 402; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Schuylkill Navigation Co. v. Freedley*, 6 Whart. 109; *Newport Bridge Co. v. Foote*, 9 Bush, 264; *Barney v. Keokuk*, 94 U. S. 324; *Canal Appraisers v. People*, 17 Wend. 571; 13 Id. 355; *Lansing v. Smith*, 8 Cowen,

146; 4 Wend. 9; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Coster v. Albany*, 43 N. Y. 399; 52 Barb. 276; *Waddell v. New York*, 8 N. Y. 95; *Chapman v. Albany Railroad Co.*, 10 N. Y. 360; *Ely v. Rochester*, 26 N. Y. 133; *Sweet v. Troy*, 62 N. Y. 630; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Spring v. Russell*, 7 Maine, 273; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353.

² *Ante*, § 122. When a company is authorized by the State to improve the navigation of a stream, subsequent purchasers from the State are not entitled to damages for a diversion of the water of the stream by the company, for the purpose of improving the navigation. *Block River Improvement Co. v. La Crosse B. & T. Co.*, 54 Wis. 659. A canal cut for the purpose of improving the navigation of a stream may be dedicated to the public. *Weatherby v. Micklejohn*, 13 N. W. Rep. 697.

³ *Nelson v. Cheboygan Slackwater Navigation Co.*, 44 Mich. 7. In this case, Cooley, J., doubted whether the State can give to private parties the control of a navigable stream for improvement, with power to charge toll at discretion.

persons using his property as he may elect.¹ If certain rates of toll are fixed by the charter of a corporation, a subsequent act, inflicting penalties on the corporation for exceeding the charter rates, is not a violation of the contract of the charter, and is valid.² The right to impose toll, conferred upon a company, in consideration of its undertaking an enterprise for the public benefit, is not lost by reason of the fact that the work does not prove beneficial,³ or that the improvements mentioned in the statute are not in all respects completed,⁴ when such condition is not prescribed by its charter; and the neglect or inability of a corporation to perform the duties required by its charter, although sufficient to produce a forfeiture, or to make it liable to indictment,⁵ is a matter between the State and the corporation, which cannot be taken advantage of collaterally until it is judicially determined,⁶

¹ *Perrine v. Chesapeake Canal Co.*, 9 How. 172.

² *Camden Railroad Co. v. Briggs*, 22 N. J. L. 623.

³ *Bennett's Branch Improvement Co.'s Appeal*, 65 Penn. St. 242, 251; *Susquehanna Boom Co. v. Dubois*, 58 Penn. St. 182. See *Commonwealth v. Allegheny Bridge Co.*, 20 Penn. St. 185; *Carman v. Clarion River Navigation Co.*, 81 Penn. St. (Pt. 2) 412. See *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 43; *Kellogg v. Union Co.*, 12 Conn. 18; *Commonwealth v. Breed*, 4 Pick. 460. Proprietors are liable for losses occasioned by want of ordinary care and the incapacity of their piers and booms to secure logs. *Weld v. Androscoggin Side Booms*, 6 Maine, 93. But they are entitled to toll on logs actually stopped, although other logs of the same owner are lost in consequence of the same defects. *Side Booms v. Weld*, 6 Maine, 105; *Penobscot Boom Co. v. Baker*, 16 Maine, 233; *Penobscot Boom Co. v. Wadleigh*, *Ibid.* 235.

⁴ *Tamar Navigation Co. v. Wagstaffe*, 4 B. & S. 288; *Quincy Canal v. Newcomb*, 7 Met. 276; *Carmen v. Clarion River Navigation Co.*, 33 Leg. Int. 239; 2 W. N. C. 720.

⁵ *Lumbard v. Stearns*, 4 Cush. 62; *Commonwealth v. Newburyport Bridge*, 9 Pick. 142. If a penalty is imposed by the statute incorporating a bridge company for unreasonably delaying or neglecting to raise the draw of the bridge, such delay or neglect does not operate as a forfeiture of the franchise. *Commonwealth v. Breed*, 4 Pick. 460. If the company builds its bridge and takes toll, it may be indicted before the expiration of the time specified for completing the bridge, for a failure to comply with the requirements of its charter. *Commonwealth v. Newburyport Bridge*, 9 Pick. 142. An indictment for neglect to provide a pier at the draw of the bridge should directly aver that a bridge has been built. *Ibid.* If a navigation company fails to improve the navigation of a stream as required by its charter, it will not be restrained by a court of equity from collecting the tolls allowed by the charter. The proper proceeding is by *quo warranto* at suit of the Commonwealth. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

⁶ *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 46; *Kellogg v. Union Co.*, 12 Conn. 20; *Hart-*

when the charter contains no reservation or condition with a view to the particular interests of individuals.¹ A corporation which is authorized by its charter to improve the navigation of a river, is not liable for injuries sustained by those who navigate the river, if it has not completed the improvement or charged toll,² or if the charter merely gives permission and does not create an obligation to make the improvement.³ And if real estate acquired by the corporation is necessary for the uses in which the public is concerned, it cannot be sold or taken on execution, apart from the incidents and burdens of the franchise, so as to give the purchaser a title divested of the obligations of the company.⁴ In general, if no provision is made in the charter, the franchise itself, when granted for the purpose of constructing works of public utility, and collecting tolls, is a personal trust and not assignable by voluntary conveyance or forced sale;⁵ but a legislative grant to a particular person, his associates and assigns, gives him the right to select the persons to be associated with him in the enterprise.⁶ If a private corporation

ford Bridge Co. v. East Hartford, 16 Conn. 173; Pearce v. Olney, 20 Conn. 557; Hamilton v. Annapolis Railroad Co., 1 Md. 553; 1 Md. Ch. 107; Commissioners v. State, 9 Gill, 397; New Central Coal Co. v. Georges Creek Coal Co., 37 Md. 537; Commonwealth v. Breed, 4 Pick. 460; Shand v. Gage, 9 S. C. 187; Young v. Harrison, 6 Ga. 130; Buncombe Turnpike Co. v. McCarrson, 1 Dev. & Bat. (N. C.) 306; People v. Reclamation District, 53 Cal. 346; Sterrett v. Houston, 14 Texas, 153; State v. Orleans Navigation Co., 7 La. Ann. 679.

¹ Proprietors v. Hahn, 28 Maine, 300; Riddle v. Locks & Canals, 7 Mass. 169.

² James River Co. v. Early, 13 Gratt. 541.

³ Goodrich v. Chicago, 20 Ill. 445; Chicago v. McGraw, 75 Ill. 566; Mills v. Brooklyn, 32 N. Y. 489; Daniels v. Denver, 2 Col. 669.

⁴ Gue v. Tide Water Canal, 24

How. 257; Gooch v. McGee, 83 N. C. 59, restricting State v. Rivers, 5 Ired. 297, and Arthur v. Bank, 9 S. & M. 394; Ammand v. Turnpike Co., 13 Serg. & R. 210; Railroad Co. v. Colwell, 39 Penn. St. 337; Foster v. Fowler, 60 Penn. St. 27; Youngman v. Railroad Co., 65 Penn. St. 278; Morris Canal Co. v. Central Railroad Co., 1 C. E. Green, 419; Coe v. Railroad Co., 10 Ohio, 372. See Attorney General v. Roanoke Navigation Co., 84 N. C. 705. An execution sale of the booms and piers of a boom company passes no right to the leasehold of shores and flats used by the company. Rollins v. Clay, 23 Maine, 132.

⁵ Ibid.; Lord v. Oconto, 47 Wis. 386; People v. Duncan, 41 Cal. 507; O. R. Co. v. O. B. Co. 45 Cal. 365; Tippets v. Walker, 4 Mass. 595; East Boston Freight Railroad Co. v. Hubbard, 10 Allen, 459, note.

⁶ Powell v. Maguire, 43 Cal. 11.

holds an entire franchise for the improvement of the navigation of a river between certain points, with power to lease a portion of the works, a lessee of such portion holds subject to the liability to forfeiture of the entire franchise in case the lessor makes default in duly improving any other portion of the stream.¹

§ 145. Statutes imposing toll, being in derogation of common right, are strictly construed.² An act which authorizes the erection of a toll-bridge, and the purchase of flats adjoining, does not, as incident to the business of maintaining the bridge, give power to build and rent wharves;³ and a company which is empowered to boom lumber, and to receive toll therefor, is not entitled to demand toll for driving lumber.⁴ The business of improving the navigability of a river for the purpose of aiding the running of logs and timber therein, has a natural and legitimate connection with the business of running logs and timber in the river when improved; and it has accordingly been held that an act creating an improvement company, which was afterwards amended so as to include the running of logs and timber, and the collection of tolls on logs, was not obnoxious to a constitutional provision that statutes shall not contain more than one subject.⁵ When a corporation is created for the purpose of making an impassable stream navigable, and no particular mode of accomplishing that result is indicated by the charter, it may be done by any of the known methods;⁶ but the manner of doing the work pointed out by the charter, if at all, must be pursued.⁷ If a grant from the State of

¹ *People v. Kankakee Improvement Co.*, 103 Ill. 491.

² *Sprague v. Birdsall*, 2 Cowen, 419; *Cayuga Bridge Co. v. Stout*, 7 Cowen, 33.

³ *Toll Bridge Co. v. Osborn*, 35 Conn. 7. A conveyance of a "bridge" across a certain stream, "together with the toll-house, stables, and out-houses of every description," and "all the privileges and appurtenances appertaining or in any wise belonging to said bridge," passes the land upon

which the bridge and buildings are erected. *Sparks v. Hess*, 15 Cal. 186.

⁴ *Bangor Booming Co. v. Whiting*, 29 Maine, 123.

⁵ *Yellow River Improvement Co. v. Arnold*, 46 Wis. 214.

⁶ *Canal Co. v. Railroad Co.*, 4 Gill & J. 1.

⁷ *Farnum v. Blackstone Canal Co.*, 1 Sumner, 47. Injuries by a dam erected for the improvement of the navigation of a river are to be compensated in the manner provided by

the right to erect a toll-bridge or wharf, or to maintain a ferry across a river does not in terms restrict the right of the legislature to make similar grants to others, a subsequent charter authorizing another similar structure upon the same river does not violate any vested rights of those to whom the privilege is first granted, or require any provision for compensation to them, although the effect may be to lessen their tolls and profits by the diversion of tolls and travel.¹

statute, if any, and not by action. *Calking v. Baldwin*, 4 Wend. 667.

¹ *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; 6 Pick. 376; 7 Pick. 344; *Richmond Railroad Co. v. Louisa Railroad Co.*, 13 How. 71; *The Binghampton Bridge*, 3 Wall. 51; *Turnpike Co. v. State*, 3 Wall. 210; *Pennsylvania College Cases*, 13 Wall. 190, 214; *Fanning v. Gregoire*, 16 How. 524; *Conway v. Taylor*, 1 Black, 603; *Parrott v. Lawrence*, 2 Dillon, 332; *Hopkins v. Great Northern Railway Co.*, 2 Q. B. D. 224; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 48; *Salem Turnpike Co. v. Lyme*, 18 Conn. 457; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Fitch v. New Haven Railroad Co.*, 30 Conn. 39; *White River Co. v. Vermont Central Railroad Co.*, 21 Vt. 590; *Mohawk Bridge Co. v. Utica Railroad Co.*, 6 Paige, 554; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Thompson v. New York Railroad Co.*, 3 Sandf. Ch. 625; *Aiken v. Western Railroad Co.*, 20 N. Y. 370; 30 Barb. 335; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Martin v. O'Brien*, 34 Miss. 21; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *Lafayette Plankroad Co. v. New Albany Railroad Co.*, 13 Ind. 90; *Wright v. Shorter*, 56 Ga. 72; *Greer v. Hangabook*, 47 Ga. 282; *McLeod v. Savannah Railroad Co.*, 25 Ga. 445; *Shorter v. Smith*, 9 Ga. 517; *Washington Toll Bridge Co. v. Beaufort*, 81 N. C. 491; *McRee v. Wilmington Railroad Co.*, 2 Jones

(N. C.) 186; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Pratt v. Brown*, 3 Wis. 603; *Fall v. Sutter*, 21 Cal. 237; *Norris v. Farmers' Co.*, 6 Cal. 590; *Indian Canyon Road Co. v. Robinson*, 13 Cal. 519; *Richmond Railroad Co. v. Rogers*, 1 Duv. (Ky.) 138; *Lake v. Virginia Railroad Co.*, 7 Nev. 294; *Piatt v. Covington Bridge Co.*, 8 Bush, 31; *Chapin v. Crusen*, 31 Wis. 209; *Janesville Bridge Co. v. Stoughton*, 1 Pinney (Wis.) 667; *Ward v. Severance*, 7 Cal. 126; *Dyer v. Tuscaloosa Bridge*, 2 Porter, 296; *Gates v. McDaniel*, 2 Stew. (Ala.) 211; *Douglas County Road Co. v. Canyonville Road Co.*, 8 Oregon, 102, 108; *Canyonville Road Co. v. Stephenson*, *Ibid.* 263; *Henderson v. Maybin*, 3 Rich. (S. C.) 153; *Trent v. Carterville Bridge Co.*, 11 Leigh, 521; *Tuckahoe Canal Co. v. James River Railroad Co.*, *Ibid.* 42; *McRee v. Wilmington Railroad Co.*, 2 Jones (N. C.) 186; *Allen v. Buncombe Turnpike Co.*, 1 Dev. Eq. 119; 2 Dev. & Bat. Eq. 115. An act incorporating a ferry toll-bridge or railroad is a private act. *Carrow v. Bridge Co.*, Phil. L. (N. C.) 118; *Burhop v. Milwaukee*, 21 Wis. 257. A grant by the State of the right "to dig, mine, and remove from the beds of navigable streams and waters within the State" certain minerals, on payment of one dollar per ton, does not convey an exclusive right. *Bradley v. So. Carolina Phosphate Co.*, 1 Hughes, 72. But see *Massot v. Moses*, 3 S. C. 168; *Doe v. Wood*, 2 B. & Ald. 724.

§ 146. If such a legislative grant gives, for an adequate consideration, privileges which are clearly exclusive, it amounts to a public pledge, and, being accepted by the grantee, has the force of a contract which the legislature has no constitutional power to impair.¹ Where, for instance, a company was authorized by its charter to construct and maintain a toll-bridge within certain defined limits, it was held that the franchise thus created could not be taken away by a statute which authorized another bridge within the same limits unless provision was made for compensation to the first grantee, as in other cases where private property is taken or vested rights are invaded under the right of eminent domain.² So, where the legislature granted the right to collect toll for a limited time, in consideration of the capital and labor to be expended in opening a canal through a slough which was not navigable, it was held that the grant could not be revoked without remunerating the grantee, and that he was entitled to collect toll after the expiration of the term.³ So, also, if the proprietor of a wharf in a harbor is authorized by the State to extend the same into the channel to a harbor line, and before the extension is made, a railroad company is incorporated with power to construct its road over the flats between the end of the wharf and the harbor

¹ Power granted by a special act to a corporation to improve the navigation of a river is not repealed by a general law authorizing the incorporation of companies with similar powers. *Black River Improvement Co. v. La Crosse Booming Co.*, N. W. Rep., Feb. 18, 1882; 8 So. L. Rev. 14. A statute which grants to one person the privilege of erecting a weir in certain tide waters is not repealed or modified by a subsequent general act which gives to all others the same right under certain conditions precedent. *State v. Cleland*, 68 Maine, 258.

² *Ibid.*; *Piscataqua Bridge v. New Hampshire Bridge Co.*, 7 N. H. 35; *Crosby v. Hanover*, 36 N. H. 404; *Backus v. Lebanon*, 11 N. H. 19; *Johnson v. Crow*, 87 Penn. St. 184; *Hart-*

ford Bridge Co. v. East Hartford, 10 How. 511; 16 Conn. 149; 17 Conn. 79, 93; *Enfield Toll Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 40; *The Binghampton Bridge*, 3 Wall. 51; 27 N. Y. 87; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Newburgh Turnpike Road v. Miller*, 5 Johns. Ch. 101; *Aiken v. Western Railroad Co.*, 20 N. Y. 370; *Cayuga Bridge Co. v. Stout*, 6 Wend. 85; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Proprietors of Bridges v. Hoboken Land Co.*, 14 N. J. Eq. 81, 503; 1 Wall. 116; *McRoberts v. Washburne*, 10 Minn. 23; *Norris v. Farmers' Co.*, 6 Cal. 590.

³ *Grant v. Leach*, 20 La. Ann. 239.

line, the first act is not a mere revocable license but a grant which is not impaired by the act of incorporation.¹ But a statute which merely authorizes a corporation to open and widen a creek or stream for the public good is not a compact, and may be repealed by the legislature.² The grant by a State legislature of a charter for a ferry across a navigable river does not give the grantee any right to control the channel of the river or to prevent its improvement without compensation to him by the United States.³ A grant of a bridge or ferry franchise, which is not in terms exclusive, does not preclude a subsequent grant, to other parties, of another franchise which impairs the value and takes away the profits of the first.⁴ But a statute which authorizes lands to be taken for a railway must be construed strictly, and not extended to a taking for ferries.⁵ And if a charter expressly provides that no other bridge or ferry shall be maintained on the same river within five miles either above or below the bridge which it authorizes, the distance is to be measured by the course of the river.⁶ A statute which prohibits the establishment of private ferries within a certain distance from any public bridge does not prohibit private ferries within such distance from a public ferry.⁷ The right to a ferry does not include the power to erect a bridge, nor does a right to build a bridge convey a ferry franchise.⁸ A ferry does not necessarily infringe upon an exclusive right to maintain a bridge.⁹ An exclusive right to maintain a toll bridge is not infringed by the erection of a railroad bridge, or the maintenance of a railroad ferry, within

¹ *Fitchburg Railroad v. Boston & Maine Railroad*, 3 Cush. 58.

² *Frederick v. Goshon*, 30 Md. 436; *Annapolis v. Harwood*, 32 Md. 480; *West Maryland Railroad Co. v. Paterson*, 37 Md. 138.

³ *Lonerger v. Mississippi River Bridge Co.*, 2 McCrary, 451; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508.

⁴ *Fall v. Sutier*, 21 Cal. 237. See *Burkhalter v. Edwards*, 16 Ga. 593.

⁵ *Sandford v. Martin*, 31 Iowa, 67.

⁶ *McLeod v. Burroughs*, 9 Ga. 213; *Bodley v. Taylor*, 5 Cranch, 191; *Littlepage v. Fowle*, 11 Wheat. 215.

⁷ *Greer v. Haugabook*, 47 Ga. 282.

⁸ *Cooper v. Athens*, 53 Ga. 638; *Hall v. Boyd*, 14 Ga. 1; *Shorter v. Smith*, 9 Ga. 517; *Sandford v. Martin*, 31 Iowa, 67.

⁹ *Parrott v. Lawrence*, 2 Dillon, 332; *Piatt v. Carrington Bridge Co.*, 8 Bush, 31.

the specified limit.¹ If the owner of an exclusive ferry franchise fails to properly accommodate the public, a court of equity may decline to aid him by enjoining the infringement of his right, and leave him to his action for damages.² Such exclusive right may be lost by estoppel, as by silently permitting another ferry or bridge to be completed at great expense.³ The provision of a charter authorizing a railroad company to cross a river by a bridge or ferry, "as may be most convenient," regards the convenience both of the navigation and the railroad; and, if there is nothing in the charter to the contrary, the decision as to which will be most convenient rests with the railroad company, which is not deprived of the right to build a bridge by the fact that a bridge would be less convenient to navigation than a ferry.⁴

§ 147. At common law a right of distress is incident to all tolls.⁵ Persons or companies authorized to receive tolls may also recover upon an express promise to pay;⁶ and if the statute provides no remedy for non-payment, the law will imply a promise to pay, which will sustain an action,⁷ even though the defendant claimed an exemption from toll and refused to pay.⁸ If a company is authorized by its charter

¹ *Lake v. V. & S. R. Co.*, 7 Nev. 204; *Mayor v. New England Transportation Co.*, 14 Blatch. 159; *Enfield Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 40; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

² *Ferrel v. Woodward*, 20 Wis. 458.

³ *Fremont Ferry Co. v. Dodge Co.*, 6 Neb. 18.

⁴ *Easton v. New York Railroad Co.*, 24 N. J. Eq. 49.

⁵ Vin. Abr. tit. Toll, I.; Bacon's Abr. tit. Distress, pl. 6; *Heddy v. Wheelhouse*, Cro. Eliz. 558; *Vinksterne v. Ebdon*, 1 Salk. 248; 1 Ld. Raym. 386. See *Woolrych on Waters*, 61, 312; *Dresser v. Bosanquet*, 4 B. & S. 460; *Stourbridge Canal v. Wheelcy*, 2 B. & A. 793; *Jenkins v. Cooke*, 1 Ad. & El. 871; *Fraser v. Swansea Coal*

Co., Ibid. 354; *Nicholl v. Gardner*, 13 Wend. 288; *Mangum v. Farrington*, 1 Daly, 236; *Warren v. McDiarmid*, 34 How. Pr. 304; *Wooster v. Blossom*, 5 Jones (N. C.) 244; *State v. Patrick*, 3 Dev. (N. C.) 478.

⁶ *Dorman v. Turnpike Co.*, 3 Watts, 126; *Beeler v. Turnpike Co.*, 14 Penn. St. 162; *Penobscot Boom Co. v. Baker*, 16 Maine, 233; *Middle Bridge Co. v. Marks*, 23 Maine, 326; *Proprietors of Upper Locks v. Abbott*, 14 N. H. 157.

⁷ *Hopkins v. Stockton*, 2 Watts & Serg. 163; *Kellogg v. Union Co.*, 13 Conn. 16; *Baltimore v. White*, 2 Gill, 444; *Quincy Canal v. Newcomb*, 7 Met. 276.

⁸ *Central Bridge v. Abbott*, 4 Cush. 473.

to "demand and recover" tolls for the passage of logs, and to stop and detain them until the tolls are paid, it can maintain an action to recover toll.¹ But if a summary remedy only is given by statute to enforce the payment of tolls, a promise to pay them is not implied, and an action of debt or assumpsit will not lie.² A promise to pay toll is without consideration, if the promissor is not legally liable to pay.³

¹ *Bear Camp River Co. v. Woodman*, 2 Maine, 404; *Penobscot Boom Co. v. Baker*, 16 Maine, 233.

² *Turnpike Co. v. Brown*, 2 P. & W. 462; *Dorman v. Turnpike Co.*, 3 Watts, 126; *Beeler v. Turnpike Co.*, 14 Penn. St. 162; *Chestnut Hill Turnpike Co. v. Martin*, 12 Penn. St. 361; *Kidder v. Boom Co.*, 24 Penn. St. 193; *Russell v. Turnpike Co.*, 13 Bush, 307; *Turnpike Co. v. Van Dusen*, 10 Vt. 197; *Witt v. Jefcoat*, 10 Rich. (S. C.) 388. See *Middle Bridge Co. v. Brooks*,

13 Maine, 391; *State v. Dearborn*, 15 Maine, 402; *Middle Bridge Co. v. Marks*, 26 Maine, 326; *Chase v. Dwinnel*, 7 Maine, 134; *Hunter v. Perry*, 33 Maine, 159; *Penobscot Boom Co. v. Lamson*, 16 Maine, 224; *Proprietors v. Hahn*, 28 Maine, 300; *Louisville v. Bank of United States*, 3 B. Mon. 138. 158; *Penobscot Boom Co. v. Penobscot Lumber Association*, 61 Maine, 533.

³ *Waterloo Turnpike Road Co. v. Cole*, 51 Cal. 381.

CHAPTER V.

RIPARIAN RIGHTS AND BOUNDARIES UPON NAVIGABLE WATERS.

SECTION.

- 148, 149. Riparian rights defined.
- 150-154. The right of access.
- 155-157. Accretions.
- 158, 159. The effect upon private rights of sudden changes caused by the currents.
- 160, 161. Defences against the sea and rivers.
- 162-165. Apportionment of alluvion between coterminous proprietors.
- 166. Islands.
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- 169. The Massachusetts Ordinance of 1647.
- 170-173. The right to occupy flats under the usages of Connecticut, New Jersey, Rhode Island, and Pennsylvania.
- 174. The same in California.
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- 176. In Maryland.
- 177. In Florida and Oregon.
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- 179. Wharfing out in fresh waters.
- 180, 181. The outward limit of the right of extending wharves, etc.
- 182-190. Rights of fishery.
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- 192. Wrecks and waifs.
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- 194. Description of boundaries upon streams.
- 195. Boundaries upon tide water.
- 196. Boundaries upon non-tidal waters.
- 197. Description limiting to bank.
- 198. The location of a stream's thread as a boundary.
- 199, 200. Boundary when limited to high-water mark or bank.
- 201. Course of stream not always followed as a boundary.
- 202. Boundaries of towns, parishes, and nations upon waters.
- 203. Boundaries upon lakes and ponds.

§ 148. Riparian rights, according to the strict meaning of the term, are such as follow, or are connected with, the ownership of the banks of streams or rivers.¹ Those whose lands border upon tide waters are called "littoral" proprietors, and there appears to be no word or phrase of sufficiently broad meaning to include both riparian and littoral, although each is sometimes used to denote the other.² The distinction between tide waters and fresh, or between public and private waters, is not necessarily a material consideration in determining questions relating to riparian rights, since riparian rights proper depend upon the ownership of land contiguous to the water, and are the same whether the proprietor of such land owns the soil under the water or not. In *Lyon v. Fishmongers' Co.*,³ Lord Selborne thus states what is now to be regarded as the established law upon this subject: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae*, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. With respect to the ownership of the bed of the river, this cannot be the foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property

¹ Riparian is derived from Latin *ripa*, a river bank.

² Littoral is derived from Latin *litus*, the sea-shore. It is now in general use, and should be employed rather than "riparian," in respect to the shores of the sea, and, also, according to important authorities, as including "riparian." *Regina v. Keyn*, 2 Ex. D. 63; *Boston v. Lecraw*, 17 How. 432, 433; *West Roxbury v.*

Stoddard, 7 Allen, 158, 167; 9 Gray, 521, note; *Hamilton v. Manifee*, 11 Texas, 718; *Smith v. Power*, 14 Texas, 146.

³ 1 App. Cas. 662; L. R. 10 Ch. 679; *Diedrich v. Northwestern Railway Co.*, 42 Wis. 248; *Stevens Point Booming Co. v. Reilly*, 44 Wis. 295, 305; *Morrill v. St. Anthony Falls Co.*, 26 Minn. 222; *Meyers v. St. Louis*, 8 Mo. App. 236.

in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good *jure naturae* as vertical."¹ "It is true that the banks of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of a stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right." All riparian rights depend upon the ownership of land which is contiguous to and touches upon the water;² and, in the case of tide waters, upon the ownership of the land above and adjoining the edge of the water at ordinary high-water mark.³ They do not attach to any lands, however near, which do not extend to the water.⁴ A mere right of way along the banks, reserved in a grant of land bounded by a river, being merely an easement, does not deprive the grantee of his rights as a riparian proprietor.⁵ But if the granted premises are bounded in terms by a public road which separates them from the water, they extend only to the centre of the road, and the grantee is not a riparian owner.⁶ So, if a meander line, run by government

¹ *Miner v. Gilmour*, 12 Moo. P. C. 131; *Chasemore v. Richards*, 7 H. L. Cas. 349, 373, 382. See, also, *Lord v. Commissioners of Sidney*, 12 Moo. P. C. 473.

² *Jones v. Johnston*, 18 How. 150; *Johnston v. Jones*, 1 Black, 209; *Bates v. Illinois Central Railroad Co.*, 1 Black, 204.

³ *Ibid.*; *Lyon v. Fishmongers' Co.*, above quoted; *Deerfield v. Arms*, 17 Pick. 41; *State v. Brown*, 3 Dutch. 13, 648; *Hoboken Land Co. v. Hoboken*, 7 Vroom, 540, 550; *Hayden v. Long*, 8 Oregon, 244.

⁴ *Ibid.*

⁵ *Hagan v. Campbell*, 8 Porter, 9; *Stetson v. French*, 10 Maine, 204;

Stetson v. Bangor, 60 Maine, 313; *Barclay v. Howell*, 6 Peters, 498; *Parish v. Stephens*, 1 Oregon, 59; *St. Louis Public Schools v. Hammond*, 21 Mo. 238; *Rowan v. Portland*, 8 B. Mon. 239. If the width of a street is clearly defined in a town plat, land lying between the street and the low-water mark of a river is not thereby dedicated to the public. *McLaughlin v. Stevens*, 18 Ohio, 94; *Kennedy v. Jones*, 11 Ala. 63.

⁶ *Banks v. Ogden*, 2 Wall. 57; *People v. Colgate*, 67 N. Y. 512; *Jewell v. Lee*, 14 Allen, 145; *Allegheny City v. Morehead*, 80 Penn. St. 113; *Brisbane v. St. Paul Railroad Co.*, 23 Minn. 114; *Allen v. Munn*, 55 Ill. 486;

surveyors in surveying the public lands, leaves between such line and the bank of the stream a considerable body of land which is above the ordinary stage of the water in the stream, and is covered with vegetation or timber, the patent of the surveyed land is limited by the meander line and the patentee is not a riparian proprietor.¹ When a title to land enclosed by a river is acquired by disseisin, and the disseisor occupies as near the river as convenient, it may amount to a possession of the whole lot, if such was his intention, although there is a narrow strip uncultivated along the river; and he may thus be entitled to riparian rights.²

§ 149. Riparian rights exist on the banks of navigable waters as well as of unnavigable streams. In the former case they are subordinate to the public right of navigation; and, while in a non-navigable river all the riparian owners might combine to completely divert, diminish, or pollute the stream, in a navigable river the right of navigation would intervene and prevent this being done.³ The rights actually exercised by the proprietors of land on the shores of tide water are often dissimilar from those enjoyed by proprietors above the flow of the tide, since salt water is less available in the arts, or for irrigation, etc., than fresh. But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water, for the purpose of using the right of navigation. This right of access is his only, and exists by virtue and in respect of his riparian property. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance,⁴ or authorized by the legislature. In

Field v. Carr, 59 Ill. 198; Cowles v. Gray, 14 Iowa, 1; Grant v. Davenport, 18 Iowa, 179; Mariner v. Schulte, 13 Wis. 692; Arnold v. Elmore, 16 Wis. 509; Yates v. Judd, 18 Wis. 118. A right of way may be appurtenant to land, from which it is divided by a navigable river. Lazaretto Road, 1 Ash. (Penn.) 417.

¹ Lammers v. Nissen, 4 Neb. 250, 452.

² Allen v. Holton, 20 Pick. 458; Ridgway v. Ludlow, 58 Ind. 248.

³ Lyon v. Fishmongers' Co., 1 App. Cas. 662; Orr Ewing v. Colquhoun, 2 App. Cas. 656.

⁴ Ante, § 124.

the above case of *Lyon v. Fishmongers' Co.*,¹ it was held that the power given to conservators of the Thames, under the act of Parliament by which they were constituted, to grant a license to a riparian owner to make an embankment in front of his land on the river, did not authorize the licensee to embank in front of his own land so as to affect injuriously the rights of an adjoining riparian owner, though such license might be a justification with respect to the public right of navigation. In *Yates v. Milwaukee*,² in the Supreme Court of the United States, a municipal corporation, which was authorized by the legislature to establish dock and wharf lines upon rivers within its limits, and to restrain and prevent encroachments upon the rivers and obstructions thereto, declared by ordinance that the plaintiff's wharf was a nuisance to the navigation, and ordered it abated. In deciding that such ordinance was of itself insufficient evidence upon the question whether the wharf was in fact a nuisance,³ Miller, J., said, with respect to lots adjoining navigable rivers: "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public."⁴ "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it can-

¹ 1 App. Cas. 662; L. R. 10 Ch. 679. See *Kearns v. Cordwainers' Co.* 6 C. B. N. S. 388; *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; L. R. 3 Ex. 306; *Attorney General v. Conservators of the Thames*, 1 H. & M. 1; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Bell v. Quebec*, 5 App. Cas. 84; *Brown v. Gagy*, 10 Jur. N. S. 525.

² 10 Wall. 497.

³ Generally, authority to abate nui-

sances, or to regulate wharves, does not include the power to declare that a nuisance which is not so in fact. *Pye v. Peterson*, 45 Texas, 312; *Evansville v. Martin*, 41 Ind. 145; *Everett v. Council Bluffs*, 46 Iowa, 66; *Babcock v. Buffalo*, 56 N. Y. 268.

⁴ *Dutton v. Strong*, 1 Black, 25; *Schurmeir v. Railroad Co.*, 7 Wall. 272; *Atlee v. Packet Co.*, 21 Wall. 389.

not be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested,¹ the owner can only be deprived in accordance with established law; and, if necessary that it be taken for the public good, upon due compensation."²

§ 150. This right is limited to the right to enter from one's own estate upon the highway, and to pass from the highway to one's own estate, and does not include the right to redress for an obstruction which is not against the front of the plaintiff's land, even when it entirely closes the highway.³ It doubtless follows, from the important decisions just referred to, that access, as thus defined, cannot, without compensation, be taken away by the State, as owner in fee of the bed and shores of navigable waters, or by virtue of its power to regulate and control them for public purposes. In *Buccleuch v. Metropolitan Board of Works*,⁴ the House of Lords held that the owner of an estate upon the tide waters of the Thames was entitled to compensation, not only for the land actually taken for the construction of a public road, but also for the change of his premises from river-side to

¹ In this case the wharf which it was attempted to condemn as a nuisance was actually built.

² See also *Webber v. Harbor Commissioners*, 18 Wall. 57; *Atlee v. Packet Co.*, 21 Wall. 389; *Richardson v. Boston*, 24 How. 188; *Baltimore Railroad Co. v. Chase*, 43 Md. 23; *Harrison v. Sterrett*, 4 H. & McHen. 540; *Diedrich v. North Western Railway Co.*, 42 Wis. 248; *Delaphine v. Chicago Railway Co.*, Id. 214; *Meyers v. St. Louis*, 8 Mo. App. 266; *Barron v. Baltimore*, 2 Am. Jurist, 203; *Clark v. Peckham*, 10 R. I. 35, 38; 9 R. I. 455; *Morrill v. St. Anthony Falls Co.*, 26 Minn. 222; *Norfolk City v. Cooke*, 27 Gratt. 430, 435. If the loss occasioned by an interruption of the right of access to a highway is capable of pecuniary compensation, the remedy is by an action at law for damages,

and not by proceedings in equity for an injunction. *Stone v. Peckham*, 12 R. I. 27.

³ *Ante*, § 124; *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 389; *Boston & Worcester Railroad v. Old Colony Railroad*, 12 Cush. 605.

⁴ L. R. 5 H. L. 418; L. R. 3 Ex. 306; L. R. 5 Ex. 221. See, also, the English and Massachusetts cases cited *ante*, §§ 122, 124. *Beckett v. Midland Railway Co.*, L. R. 3 C. P. 82; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Ricket v. Metropolitan Railway Co.*, L. R. 2 H. L. 175; *Bell v. Hull & Selby Railway Co.*, 6 M. & W. 699; *Chamberlain v. West End of London Railway Co.*, 2 B. & S. 605; *Moore v. Great Southern Railway Co.*, 10 Ir. R. C. L. 46; *Regina v. Rynd*, 16 Ir. R. C. L. 29.

road-side property, including his individual and particular right to use the shore of the river in which he had no proprietary interest. In Wisconsin a riparian proprietor is entitled to compensation from a railroad corporation, which so builds its road, under the authority of the State, as to deprive him of access to and from his land, and of the facilities which the location of the land affords, although the road is constructed beyond the water's edge, which is the boundary of his title.¹ This view has been approved in Rhode Island² and Minnesota.³

§ 151. Upon the other hand it was held in New York, in *Gould v. Hudson River Railroad Co.*,⁴ which was prior to the decision of the Supreme Court of the United States in *Yates v. Milwaukee*,⁵ that, as the owners of lands adjoining a navigable river have no private right of property in the waters of the river, or in its shores below high-water mark, they are not entitled to compensation when a railroad, constructed under a grant from the legislature along the shore between high and low-water mark, cuts off all communication between such lands and the river otherwise than across the

¹ *Chapman v. Oshkosh & Mississippi Railroad Co.*, 33 Wis. 629; *Delaphine v. Chicago Railroad Co.*, 42 Wis. 214; *Diedrich v. North Western Railway Co.*, *Ibid.* 248, 264; *Holton v. Milwaukee*, 31 Wis. 38.

² *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348, 361; *Clark v. Peckham*, 10 R. I. 35, 38; 9 R. I. 455. See *Cooley Const. Lim.* 544, note; *Cleveland Railroad Co. v. Ball*, 5 Ohio St. 568; *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Mich. 18; *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206; *In re Philadelphia Railroad Co.*, 6 Whart. 25, 46; *Commonwealth v. Richter*, 1 Penn. 467; *Pittsburgh v. Scott*, 1 Penn. St. 309, 317; *Ashby v. Eastern Railroad Co.*, 5 Met. 368; *Dodge v. County Commissioners*, 3 Met. 380; *Chicago Railroad v. Stein*, 75 Ill. 41.

³ *Brisbine v. St. Paul Railroad Co.*, 23 Minn. 114; *Carli v. Stillwater Transportation Co.*, 25 Alb. L. Journ. 156.

⁴ *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522; 12 Barb. 616; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *People v. Tibbetts*, 19 N. Y. 523, 528; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 245; *People v. New York Ferry Co.*, 68 N. Y. 71, 78; 7 Hun. 105; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Canal Appraisers*, 33 N. Y. 461, 467; *People v. New York*, 8 Abb. Pr. 7, 12; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; 7 Rob. 523; *Hudson River Railroad Co. v. Loeb*, 7 Rob. 418; *Getty v. Hudson River Railroad Co.*, 21 Barb. 617; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70, 96. But see *Fowler v. Mott*, 19 Barb. 204, 220.

⁵ 10 Wall. 497; *ante*, § 149.

road. This doctrine, which rests apparently upon the ground that the injury suffered by the riparian owner, though greater in degree, is the same in kind as that sustained by the general public and by those who, not being riparian owners, have occasion to approach it over that part of the bank occupied by the road,¹ is also supported by *Tomlin v. Dubuque Railroad*,² in Iowa, decided shortly after *Yates v. Milwaukee*, which is not there referred to, and prior to the English cases above cited;³ and by *Stevens v. Paterson Railroad Co.*,⁴ in New Jersey, which was decided just before *Yates v. Milwaukee*, and in which the decision of the Exchequer Chamber in *Buccleuch v. Metropolitan Board of Works*⁵ was relied upon,⁶—a decision which was afterwards reversed by the House of Lords upon the grounds above stated.⁷ When it is conceded that riparian rights are property, the question as to the right to take them without compensation would appear to be at an end.

§ 152. If a city so constructs its sewers and drains discharging its navigable waters that their contents are not carried away by the tides or current, but cause accumulations in front of a wharf and obstruct the access of vessels, the owner of the wharf may recover damages against the city in an action of trespass on the case,⁸ or he may obtain relief by

¹ See remarks of Beasley, C. J., in *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532, 549. *v. The C. D. & M. R. Co.*, 47 Iowa, 370.

² 32 Iowa, 106. See *McManus v. Carmichael*, 3 Iowa, 1. The following decisions in Iowa recognize or support *Tomlin v. Dubuque Railroad Co.*: *Ingraham v. Chicago Railroad Co.*, 34 Iowa, 249, 252; *Cook v. Burlington*, 36 Iowa, 357, 365; *Musser v. Hershey*, 42 Iowa, 356, 361; *Kucheman v. The C. C. & D. R. Co.*, 46 Iowa, 366, 378. The matter is not provided for by statute in this State. See *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Railway Co. v. Renwick*, 102 U. S. 180; *Barney v. Keokuk*, 94 U. S. 324; *Renwick v. The D. & N. W. R. Co.*, 49 Iowa, 664, 669; *Houghton*

³ *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; L. R. 10 Ch. 679; *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; L. R. 5 Ex. 222; L. R. 3 Ex. 306; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Bell v. Quebec*, 5 App. Cas. 84.

⁴ *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532; 20 N. J. Eq. 126. See *Stockham v. Browning*, 18 N. J. Eq. 390; *Tinsman v. Belvidere Delaware Railroad Co.*, 26 N. J. L. 148; 25 Id. 255. ⁵ L. R. 5 Ex. 221.

⁶ 34 N. J. L. 543, 544.

⁷ L. R. 5 H. L. 418; *Meyers v. St. Louis*, 8 Mo. App. 266, 276.

⁸ *Boston v. Richardson*, 19 How.

injunction against the continuance of the nuisance.¹ In the latter case the proof that a nuisance exists must be clear,² and the court in granting the injunction will postpone its operation for a reasonable time in order that the city may take measures to remove the nuisance without unnecessary injury to the public health or interests.³

§ 153. The right of unobstructed access is also limited to the front of the land, and does not include the right, if the riparian owner fills out his entire frontage, to have the docks or water spaces on either side kept open in order that he may have access to the sides of his wharf.⁴ If the adjoining owners do not fill up in front of their lands, the general public and the owner of the improved bank may alike use the water for navigation, and thus have access to the sides of the wharf.⁵ But the adjoining proprietors, so far as they have the right to wharf out, may at pleasure close up the water spaces in front of their own lands, even at the sides of another's wharf which is expressly authorized by the legislature.⁶

§ 154. The existence of this right of access does not preclude any lawful exercise by the public of the right of

263, 270; *Boston v. Lecraw*, 17 How. 426; *Clark v. Peckham*, 10 R. I. 35; 9 R. I. 455.

¹ *Ante*, § 121; *Breed v. Lynn*, 126 Mass. 367, 370; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Rowe v. Granite Bridge*, 21 Pick. 344, 347; *District Attorney v. Lynn Railroad Co.*, 16 Gray, 242, 245; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; *Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146, 163; *Attorney General v. Leeds*, L. R. 5 Ch. 583.

² *Ibid.*

³ *Ibid.*; *Attorney General v. Birmingham*, 4 K. & J. 528, 548; *Attor-*

ney General v. Bradford Canal, L. R. 2 Eq. 71, 84; *Attorney General v. Gee*, L. R. 10 Eq. 131, 135; *Breed v. Lynn*, 126 Mass. 367, 370; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

⁴ *Gray v. Bartlett*, 20 Pick. 186; *Clark v. Peckham*, 10 R. I. 35; 9 R. I. 455; *Central Wharf v. India Wharf*, 123 Mass. 567.

⁵ *Ibid.*

⁶ *Ibid.*; *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 18 N. J. Eq. 13, 511. As to maintaining use and occupation for the use of a dock or unimproved shore, see *Easby v. Patterson*, 19 Am. L. Reg. n. s. 145; *Moore v. Jackson*, 2 Abb. N. C. 211; *Stewart v. Fitch*, 31 N. J. L. 17; *Hall v. Jacobs*, 7 Bush, 595.

navigation or of a similar right of access by adjoining proprietors. If a wharf is extended not only in front of one's own land, but also in front of that of an adjoining proprietor, it is an encroachment upon the latter's rights which may be redressed by injunction.¹ In *Marshall v. Ulleswater Steam Navigation Co.*,² the owner of the soil of a navigable lake, which was a public highway, permitted a pier to be erected on his land, and afterwards maintained it, and it was held that he had no cause of action against the owners of steamboats who landed and embarked passengers at the pier, it appearing that this structure prevented the defendants from using their own adjoining land as a landing. In *Original Hartlepool Collieries Co. v. Gibb*,³ it was held that a navigable river, being a public highway, open to the reasonable use of all subjects of the realm, a riparian proprietor was entitled to moor to his wharf for a reasonable time vessels which overlapped the wharf of an adjoining proprietor, if the free and necessary access to the latter wharf was not obstructed thereby. The right of each of several adjoining proprietors is the right to approach the front of his land or wharf, and one proprietor has no cause of action against his neighbor, if the latter's improvement of his own estate and in front thereof prevents vessels from approaching the side of the former's wharf.⁴

§ 155. This right of access is not lost by the gradual formation of new soil upon the margin of the water caused by the action of the tides or current. Estates bordering upon navigable waters often derive a great part of their value from that circumstance; and the riparian owners, if deprived of the benefit of that situation by extraneous additions, would suffer hardship and injustice, even when they obtained the full proportion of the land measured by the

¹ *Thornton v. Grant*, 10 R. I. 477, 487; *Gray v. Bartlett*, 20 Pick. 186; *ties Railway Co. v. Darling*, 5 J. Scott, N. S. 821.

Frink v. Lawrence, 20 Conn. 121; *Van* ³ 5 Ch. D. 713; *ante*, § 96.

Der Brooks v. Currier, 2 Mich. N. P. ⁴ *Gray v. Bartlett*, 20 Pick. 186; *United States v. Bain*, 3 Hughes, 593.

21. ² L. R. 7 Q. B. 166; *Eastern Coun-* See *Davis v. Atkins*, 9 Cush. 13.

surface.¹ Land formed by *alluvion*, or the gradual and imperceptible accretion from the water, and land gained by *reliction*, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made.² There is no distinction in this respect between soil gained by accretions and that uncovered by reliction.³ The change is imperceptible when it is not discernible in its progress, though the fact that there has been an increase may be perceptible year by year or at shorter intervals.⁴ Conversely, land gradually encroached upon by navigable waters ceases to belong to the former owner.⁵ The external bounds of estates situated upon the shore of the sea or of navigable rivers may thus gradually shift as the water recedes or encroaches, although the right

¹ *Deerfield v. Arms*, 17 Pick. 41, 45; *Cambre v. Cohn*, 8 N. S. (La.) 576.

² *Rex v. Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh (N. S.) 147; 1 Dow (N. S.) 178; *New Orleans v. United States*, 10 Peters, 662; *County of St. Clair v. Lovington*, 23 Wall. 46; *Perry v. Pratt*, 31 Conn. 442; *Morgan v. Scott*, 26 Penn. St. 51; *Gerrish v. Clough*, 48 N. H. 9; *Morgan v. Livingston*, 6 Martin, 216; *Livingston v. Heerman*, 9 Martin, 656; *Ingraham v. Wilkinson*, 4 Pick. 268, 273; *Deerfield v. Arms*, 17 Pick. 41; *Hopkins Academy v. Dickenson*, 9 Cush. 551; *Spigener v. Cooner*, 8 Rich. (S. C.) 301; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Patterson v. Gelston*, 23 Md. 432; *Goodsell v. Lawson*, 42 Md. 348; *Baltimore Railroad Co. v. Chase*, 43 Md. 23; *Ridgely v. Johnson*, 1 Bland Ch. 316, note; *Barrett v. New Orleans*, 13 La. Ann. 105; *Barre v. New Orleans*, 22 La. Ann. 613; *Hagan v. Campbell*, 8 Porter, 9; *Schultes's Aquatic Rights*, 116; 2 Am. Law Journ. 283, 393. The right to alluvion depends upon contiguity, and the accretions belong to the land immediately adjoining the water, however narrow it may be, or whatever may

be the size of the parcel behind it. *Saulet v. Shepard*, 4 Wall. 502; *Bates v. Illinois Central Railroad Co.*, 1 Black, 204, 208; *Bristol v. Carroll County*, 95 Ill. 84; *Beaufort v. Duncan*, 1 Jones (N. C.) 234; *Posey v. James*, 7 Lea (Tenn.) 98.

³ *Handly v. Anthony*, 5 Wheat. 380; *Boorman v. Sunnuchs*, 42 Wis. 233, 244.

⁴ *Ibid.*; *Attorney General v. Chambers*, 4 De G. & J. 70; *Gifford v. Yarborough*, 5 Bligh, 163; *Hale, De Jure Maris*, c. 1, 4, 6; *Just. Inst. lib. 2, tit. 1, § 20*. In *Boorman v. Sunnuchs*, 42 Wis. 233, 245, it was said that if a portion of the bed of a pond is laid bare within a day or week, although the human eye is not sufficiently acute to detect the process, yet the portion laid bare would not pass to the owner of the adjoining land, and that, while no precise rule of universal application can be laid down on the subject, yet the proofs should show more than the inability of a person who is watching the process, to detect the recession of the water.

⁵ *In re Hull & Selby Railway Co.*, 5 M. & W. 327; *Foster v. Wright*, 4 C. P. D. 438.

to the shore itself of course remains in the Crown or State.¹ The law upon this subject is based upon the maxim *Qui sentit onus debet sentire commodum*, since the owner takes the chance of gradual loss as well as of gradual gain;² and upon the impracticability of identifying from day to day the small additions and subtractions caused by the constant

¹ *Scrutton v. Brown*, 4 B. & C. 485; *Rex v. Yarborough*, *supra*.

² *County of St. Clair v. Lovington*, 23 Wall. 46, 63; *New Orleans v. United States*, 10 Peters, 662, 717; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Giraud v. Hughes*, 1 Gill & J. 249; *Berry v. Snyder*, 3 Bush, 266, 277; *Smith v. Public Schools*, 30 Mo. 290; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532, 540; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 213. Blackstone and others refer to the maxim, *De minimis lex non curat*, as being the foundation of the rule. 2 Black. Com. 262; *Rex v. Yarborough*, above cited; *Woolrych on Waters*, 445. In *Attorney General v. Chambers*, 4 DeG. & J. 55, 68, Lord Chelmsford, L. C., said: "I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in the case of *The Hull and Selby Railway Company*, (a) viz., 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle,' as to gradual accretion, 'is founded on the

necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighboring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which applies to a result and not to the manner of its production. Of course, an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the sea-shore, however difficult such proof of intention may be." Accretions assume the quality of the land to which they attach themselves. If the lord of a manor is entitled to such land as part of his demesne, the accretions become his absolutely; if he is only entitled subject to a copyhold interest, then they will be his subject to such interest; and if the land is part of the waste of the manor, the lord's right to the increase will be subject to the rights of

action of the water.¹ The rule is the same when the old boundaries are not known, and when they can be ascertained.²

The doctrine as to alluvion is equally applicable to tide waters and to non-tidal rivers and lakes;³ to those waters which do and those which do not overflow their banks, and where dykes and other defences are and where they are not necessary to keep the water within its proper limits. It is not applicable where the soil of another is laid bare by the gradual subsidence of a mill-pond caused by the decay of the dam;⁴ but in general it applies to artificial ponds,⁵ as well as to natural waters, and to changes made by artificial as well as natural causes, if the artificial cause is not itself unlawful, and the gradual acquisition of the new soil results from the exercise of lawful rights of property and not from operations tending or intended to produce the change.⁶ "If," says Hunt,⁷ "manufacturing or mining operations upon lands bordering on the sea or upon a public river cause a gradual silting up of rubbish, slate, or other matter, either upon the lands where the manufactories or mines are situ-

the tenants for commonage, etc., in the waste. Hall on the Seashore, 127; Hunt on Boundaries, 24.

¹ Foster v. Wright, 4 C. P. D. 438.

² *In re* Hull and Selby Railway Co., 5 M. & W. 327; Foster v. Wright, 4 C. P. D. 438; Rex v. Yarborough, 3 B. & C. 106; *ante*, p. 109, n. 3; 2 Black. Com. 261; Hale, De Jure Maris, c. 1, 6; Britton, Bk. 2, c. 2; Bracton, Bk. 2, c. 2, § 1; Fleta, Bk. 3, c. 2, §§ 2, 6; Callis on Sewers, 51. In Scotland, see Stewart v. Greenock Harbor Trustees, 4 Scot. Ses. Cas. (3d series) 283; Smart v. Dundee, 8 Bro. P. C. 199; Todd v. Dunlop, 2 Rob. Sc. App. 333.

³ Foster v. Wright, 4 C. P. D. 438; Ford v. Lacy, 7 H. & N. 151; Hale, De Jure Maris, c. 1; Barnes v. Keokuk, 94 U. S. 324; Banks v. Ogden, 2 Wall. 57; County of St. Clair v. Lovington, 23 Wall. 46; Lovington v. County of St. Clair, 64 Ill. 56; Granger v. Swart, 1 Woolw. 88; Ridgway v. Ludlow, 58 Ind. 248; Benson v.

Morrow, 61 Mo. 345; Warren v. Chambers, 25 Ark. 120; Murry v. Sermon, 1 Hawks (N. C.) 56; Giraud v. Hughes, 1 Gill & J. 249; Lamb v. Ricketts, 11 Ohio, 311; Niehaus v. Shepherd, 26 Ohio St. 40.

⁴ Eddy v. St. Mars, 53 Vt. 462.

⁵ Cook v. McClure, 58 N. Y. 437.

⁶ Attorney General v. Chambers, 4 De G. & J. 55; 4 De G. M. & G. 206; Smart v. Magistrates of Dundee, 8 Bro. P. C. 119; Seebkristo v. East India Co., 10 Moo. P. C. 149; Blackpool Pier v. Fylde Union, 46 L. J. M. C. 189; Adams v. Frothingham, 3 Mass. 352; Halsey v. McCormick, 18 N. Y. 147; 13 N. Y. 296; Dana v. Jackson St. Wharf Co., 31 Cal. 118; County of St. Clair v. Lovington, 23 Wall. 46, 62; Lovington v. County of St. Clair, 64 Ill. 56; Henry v. Vermont Central Railroad Co., 30 Vt. 638.

⁷ Hunt on Boundaries (2d ed.), 23.

ated, or upon the neighboring property, the materials thus accumulated would appear to be subject to the ordinary rule relating to alluvion, just as if they had been deposited by purely natural causes. Where, however, the effect of the operations and works just alluded to is to produce, not a slow and gradual, but a great and sudden acquisition of additional land to any proprietor along the shore, the rule relating to relictions applies and the property gained will go to the Crown." So, if an embankment lawfully made on a man's own land causes a silting up of sand and mud, whereby soil is gradually gained from the sea, the owner of the embankment would doubtless be entitled to this increase.¹ In *Todd v. Dunlap*,² it was held that the grantee of land adjacent to, and described in the grant as bounded by, a public river, had no right of property in a large tract of ground afterwards gained from the channel of the river by the operations of the grantors, who were trustees for improving the navigation of the river. In *Attorney General v. Chamberlaine*,³ where the Crown sought to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, and the defendant disputed the Crown's title to the soil between the then high and low-water marks, the vice-chancellor said that he apprehended that if the defendant had admitted the Crown's title to the soil between these lines, the onus would be upon the Crown to show that the ancient high-water mark extended further inland than at present. If it clearly appears that a wharf or pier built out into navigable water is a purpresture, and that its position causes sand and gravel to be gradually silted up against the adjoining land, the owner is not entitled to such increase.⁴ If a stream is diverted artificially, and not imperceptibly, there is no change in the title to the ground which is laid

¹ *Attorney General v. Chambers*, 4 De Gex & J. 68, 70; *Smart v. Dundee*, 8 Bro. Parl. Cas. 119; *Smith v. Stair*, 6 Bell App. Cas. 487.

² 2 Rob. Scotch Appeals, 333.

³ 4 K. & J. 292; *Attorney General v. Chambers*, 4 De Gex & J. 55.

⁴ *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118. Unless there has been long-continued and exclusive adverse possession. *Tracy v. Norwich Railroad Co.*, 39 Conn. 382.

bare.¹ But if the State excavates the soil of navigable waters, for the purpose of deepening a channel, and deposits the earth in front of premises which it has previously conveyed by patent, the riparian owner is entitled to this accretion.² So, a married woman is entitled to the accretions made by her husband or by a stranger by filling in in front of her land.³ Alluvion includes seaweed washed upon the shore as well as sand or gravel.⁴

§ 156. A riparian proprietor has no claim to the protection of the courts as to accretions which have not yet formed and may never be added to his property.⁵ As between vendor and vendee, the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title, and cannot be carried back by relation to the date of a title-bond under which the conveyance was made.⁶ If land bounded by water is leased or mortgaged, the lessee or mortgagee is entitled to the benefit of accretions forming after the date of the instrument under which he claims.⁷ So, the right to accretions passes with the land to an assignee in bankruptcy.⁸ And the right of dower, if not released, attaches to accretions to lands of which the husband was seized during coverture, whether they accrued while he owned the land or after he parted with the title.⁹

§ 157. In general the owner of a city lot bounding upon water is entitled to the riparian right of accretions.¹⁰ But

¹ *Halsey v. McCormick*, 18 N. Y. 147; 13 N. Y. 296.

² *Ledyard v. Ten Eyck*, 36 Barb. 102.

³ *Dickinson v. Codwise*, 1 Sand. Ch. 214.

⁴ *Emans v. Turnbull*, 2 Johns. 322; *Phillips v. Rhodes*, 7 Met. 523; *Chapman v. Kimball*, 9 Conn. 38; *Mather v. Chapman*, 40 Conn. 382.

⁵ *Taylor v. Underhill*, 40 Cal. 471.

⁶ *Johnston v. Jones*, 1 Black. 209; *Jones v. Johnston*, 18 How. 150. See *Barre v. New Orleans*, 22 La. Ann. 613; *Cire v. Rightor*, 11 La. 140;

Cochran v. Fort, 7 Martin, N. S. 622. If reference is made to a plan, the right to alluvion is determined by the date of the conveyance and not the date of the plan. *Jones v. Johnson*, 18 How. 150.

⁷ *Cobb v. Lavalle*, 89 Ill. 331; *Williams v. Baker*, 41 Md. 523.

⁸ *Kinzie v. Winston*, 4 Bank. Reg. 21.

⁹ *Lombard v. Kinzie*, 73 Ill. 446; *Gale v. Kinzie*, 80 Ill. 132; *Moore v. Kinzie*, 80 Ill. 132; *Hagan v. Campbell*, 8 Porter, 9.

¹⁰ *Jones v. Soulard*, 24 How. 41; *Smith v. Public Schools*, 30 Mo. 301;

if a street is laid out, or land is dedicated to public use, along the margin of the water, the grantee of a lot on the opposite side of the street takes only to the centre of the street or dedicated land, and the original proprietor is entitled to accretions by alluvion upon the soil adjoining the river.¹ And if a levee or embankment is lawfully constructed by a city along the margin of waters which are the property of the State to high-water mark, it is the artificial boundary of the private lots adjoining, and accretions added thereto belong to the city as riparian owner.² A highway which extends across the shore to navigable water continues to the water if the shore is afterwards enlarged by accretions;³ and the riparian owner cannot, by filling in, and thus extending his land, even when his right to do so is unquestioned, obstruct the public right of way to the water.⁴ A city, being the owner of a quay, or river bank, is entitled to alluvial formations added thereto, like any riparian pro-

Le Beau v. Gavin, 37 Mo. 556; *Public Schools v. Risley*, 40 Mo. 356; 10 Wall. 91; *Smith v. St. Louis*, 21 Mo. 36; *Yeatman v. New Orleans*, 13 La. Ann. 154; *Sarpy v. New Orleans*, 13 La. Ann. 349; *Barrett v. New Orleans*, 13 La. Ann. 105.

¹ *New Orleans v. United States*, 10 Peters, 662; *Jones v. Soulard*, 24 How. 41; *Boston v. Richardson*, 24 How. 188; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepard*, 4 Wall. 502; *Schools v. Risley*, 10 Wall. 91; 40 Mo. 356; *Cook v. Burlington*, 30 Iowa, 94; 36 Iowa, 357; *Lebaume v. Pocthington*, 21 Mo. 36; *Morgan v. Livingston*, 6 Martin, 19, 251; *Municipality v. Orleans Cotton Press*, 18 La. 122, 240; *Kennedy v. Municipality No. 2*, 10 La. Ann. 54; *Remy v. Municipality No. 2*, 11 La. Ann. 148; 12 Id. 500; *Barrett v. New Orleans*, 13 La. Ann. 105, 154, 349; *Carrollton Railroad Co. v. Winthrop*, 5 La. Ann. 36; *Chambre v. Kohn*, 8 Martin, 572; *Cochran v. Fort*, 7 Martin, N. S. 622; *Cire v. Rightor*, 11 La. 140; *Winter v. City*, 26 La. Ann. 310; *Brisbane v. St.*

Paul Railroad Co., 23 Minn. 114. See *Watson v. Peters*, 26 Mich. 508; *State v. Nudd*, 23 N. H. 327; *Talbot v. Richmond Railroad Co.*, 31 Gratt. 685.

² *New Orleans v. United States*, 10 Peters, 662; *Musser v. Hershey*, 42 Iowa, 356.

³ *Wood v. San Francisco*, 4 Cal. 19; *Eldridge v. Cowell*, 4 Cal. 80; *Lockwood v. New York Railroad Co.*, 37 Conn. 387; *Godfrey v. Alton*, 12 Ill. 29; *Balliet v. Commonwealth*, 17 Penn. St. 509; *Stetson v. Bangor*, 60 Maine, 313; *Kennedy v. Jones*, 11 Ala. 63; *Magraw v. Hailman*, 23 Pitts. L. J. 113.

⁴ *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540; *Jersey City v. Morris Canal Co.*, 12 N. J. Eq. 548, 253; *Newark Lime Co. v. Newark*, 15 N. J. Eq. 64; *Morris Canal Co. v. Central Railroad Co.*, 16 N. J. Eq. 419, 437; *Associates v. Jersey City*, 4 Hal. Ch. 714; *People v. Lambier*, 5 Denio, 9; *Peck v. Providence Steam Engine Co.*, 8 R. I. 353; *Lockwood v. New York Railroad Co.*, 37 Conn. 387; *Frankfort v. Lennig*, 1 Am. L. Reg. 357.

prietor.¹ In *New Orleans v. United States*,² it was held that the dedication, to the public use of a city, of a quay along a river bank, carried with it the gradual increase by alluvion formed by the river.

§ 158. When the denudation of the soil of the water is sudden and perceptible, the title is not changed. In the case of tide-waters the land thus gained belongs to the Crown at common law,³ and in this country to the State.⁴ This is true, also, of the navigable fresh-water rivers and lakes of this country in those States where the soil of such waters is held to be public property like the sea,⁵ the title to such soil being in the State and not in the United States.⁶ If navigable waters, owned by the Crown or State, suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon the recession of the water it is restored as his property.⁷ Though the overflow continues for forty years, yet if the water recedes the owner has his land again.⁸ Where the side of an island

¹ *New Orleans v. United States*, 10 Peters, 662; *Jones v. Soulard*, 24 How. 41; *Remy v. Municipality*, 15 La. Ann. 657; *Cochran v. Forte*, 7 N. S. (La.) 626; *Packwood v. Walden*, Id. 88; *Parish v. Municipality No. 2*, 8 La. Ann. 145.

² 10 Peters, 662, 712.

³ *Rex v. Yarborough*, above cited; *Foster v. Wright*, 4 C. P. D. 438; *Mussumat Imaum Bendi v. Hergovind Ghose*, 4 Moo. Ind. App. 405; *Hale, De Jure Maris*, c. 1, 4, 6; *Hargrave's Law Tracts*, 15; 2 Black. Com. 261, 262; *Callis on Sewers*, 47, 51, 482; *Woolrych on Waters*, 34; *Dyer*, 326 a; *Roll. Abr.* 170; *Vin. Abr. tit. Prerogative, B.*; *Com. Dig. tit. Prerogative, D.* 62; *Bacon's Abr. tit. Prerogative, B.*; *Phear's Rights of Water*, 43; *Attorney General v. Turner*, 2 Mod. 106; 1 Keb. 301; *Whitaker v. Wise*, 2 Keb. 750; *Royal Fishery of the Banne, Sir John Davies*, 59; 2 Vent. 188; *Commonwealth v.*

Alger, 7 Cush. 53; *Chapman v. Kimball*, 9 Conn. 38, 41; *Champlain Railroad Co. v. Valentine*, 19 Barb. 484, 493; *Hagan v. Campbell*, 8 Porter, 9.

⁴ *Ibid.*; *Boorman v. Sunnuchs*, 42 Wis. 233.

⁵ *Ibid.*; *Murry v. Sermon*, 1 Hawks, (N. C.) 56.

⁶ *Ibid.*; 6 Op. Att. Gen. 172; 7 Id. 314. But accretions added to improvements made by the United States belong to it. 5 Op. Att. Gen. 264.

⁷ Note 2, *ante*, page 286; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Ford v. Lacy*, 7 H. & N. 151; *Hale, De Jure Maris*, c. 1, 6; *Hargrave's Law Tracts*, 2, 15; *Woolrych on Waters*, 22, 37; *Foster v. Wright*, 4 C. P. D. 438; *Murphy v. Norton*, 61 Penn. St. 147.

⁸ 2 Roll. Abr. 168; *Schultes's Aquatic Rights*, 122; *Callis on Sewers*, 51, note. See *Mussumat Imaum Bendi v. Hergovind Ghose*, 4 Moo. Ind. App. 405.

was gradually washed away by tide-water, and the soil was afterwards restored by the deposit of alluvion, the new soil was held to belong to the owner of the fast land.¹ But if the sea gradually and imperceptibly encroach upon private lands, or the bounds are lost, and the situation and extent of the lost land cannot be ascertained, it belongs to the Crown at common law, and in this country to the State.²

§ 159. When a tidal river does not work a shifting of the shore, but by the irruption of its waters forms an entirely new channel in private lands, not only does the right to the soil thus covered remain in the owner, but the right of fishery is his and not in the public, though the public right of navigation may extend to the new channel.³ If an unnavigable stream, in which the title of the riparian owners extends *ad flum aquae*, slowly and imperceptibly changes its course, the boundary line is at the centre of the new channel.⁴ But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits between the two estates.⁵ Where a right of several fishery had been exercised to the thread of a river flowing through an estuary, and the river changed its

¹ *Morris v. Brooke* (Del.) 25 Alb. L. Journ. 90.

² *Ibid.*; *Dyer*, 326 a; 2 Roll. Abr. 168; *Phear's Rights of Water*, 43; *Schultes's Aquatic Rights*, 122; *Woolrych on Waters*, 23, 37; *In re Hull & Selby Railway*, 5 M. & W. 327; *Zetland v. Glover Incorporation of Perth*, L. R. 2 H. L. Sc. 70; *Wedderburn v. Paterson*, 2 Sc. Sess. Cas. (3d series), 902.

³ *Carlisle v. Graham*, L. R. 4 Ex. 366; *Miller v. Little*, L. R. 2 Ir. 304; *Hale, De Jure Maris*, c. 6; *Hargrave's Law Tracts*, 34; *Rolle Abr.* 390. In this country it would extend to the new channel, navigable waters being those which are navigable in fact. *Ante*, c. 3. In England, it would still

seem to depend upon user or the fact that the river was tidal. *Ibid.*

⁴ *Ford v. Lacey*, 7 H. & N. 151; 7 Jur. n. s. 684; *Foster v. Wright*, 4 C. P. D. 438; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Gerrish v. Clough*, 48 N. H. 9; *Niehaus v. Shepherd*, 26 Ohio St. 40; *Collins v. State*, 3 Texas App. 323; *Woodbury v. Short*, 17 Vt. 387; *Browne v. Kennedy*, 5 H. & J. 195; *Goodsell v. Lawson*, 42 Md. 348; 2 Black. Com. 262.

⁵ *Ibid.*; *Spigener v. Cooner*, 8 Rich. (S. C.) 301; *Lynch v. Allen*, 4 Dev. & Bat. 62; *Dwinel v. Barnard*, 28 Maine, 469; *Just. Inst. lib. 2, tit. 1, § 23*; *Bracton*, 221; 2 Black. Com. 262.

course, it was held, in an action of trespass for fishing to the thread of the new river, that the middle of the new stream and not of the old was the local limit of the fishery.¹ But where a river which was originally within the lands of one proprietor encroached by gradual and imperceptible degrees upon the land of the defendant, an adjoining proprietor, so that a strip of such land became part of the river bed, it was held that the first proprietor had not lost his property in the bed of the stream by the gradual change of its course, and could maintain an action of trespass against the defendant for fishing at a point in the bed which was the latter's property before the encroachment.² When a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel.³ If a boundary river between States forms a new and distinct channel, the jurisdiction of the respective States is not affected,⁴ but any gradual accretion of land belongs to the State which owns the bank to which it is added.⁵

§ 160. The owners of lands exposed to the inroads of the sea or of inland waters may erect walls and embankments to prevent the wearing away of the land or to protect it from overflow. It is lawful to embank against the sea, even when the effect may be to cause the water to beat with increased violence against the adjoining land, thereby rendering it necessary for the adjoining land-owner to enlarge or

¹ *Miller v. Little*, 2 L. R. Ir. 304.

² *Foster v. Wright*, 4 C. P. D. 438.

³ *Ford v. Whitlock*, 27 Vt. 265; *Woodbury v. Short*, 17 Vt. 387. In the last case acquiescence for ten years was held sufficient.

⁴ *Missouri v. Kentucky*, 11 Wall. 395; *Holbrook v. Moore*, 4 Neb. 437;

Vattel's Law of Nations; § 270; 8 Op. Att. Gen. 175; *State v. Young*, 46 Vt. 565; *Moss v. Gibbs*, 10 Heisk. 283; *Collins v. State*, 3 Texas App. 323. See *Kent v. Atlantic De Laine Co.*, 8 R. I. 305.

⁵ *Handly v. Anthony*, 5 Wheat. 380; *Vattel*, lib. 1, c. 22, § 268.

strengthen his defences.¹ But this rule is not applicable in the case of embankments by the side of a river, whether public or private.² A riparian proprietor is not only entitled to have the water flow to him in its natural state, so far as that is a benefit, as, *e.g.*, to turn his mill or water his cattle, but in times of ordinary flood he is bound to receive the water, so far as it is a nuisance by its tendency to flood his land, and cannot exclude the superabundant water to the injury of other proprietors.³ The owner of land, bounding upon an inland stream, may repair and restore the banks, when broken, but cannot make different ones. So long as his operations tend only to confine the waters within their original channel, they are not responsible for any damage to neighboring proprietors.⁴ If the owner of a dam upon a stream, the course of which is changed by an extraordinary flood, does not elect to restore the banks, he is not liable for injuries to others caused by the altered course of the stream and the continuance of his dam.⁵ Erections, intended to exclude the water, are illegal, if they cause the diversion of a stream from its accustomed channel, and throw the water upon the land of an opposite or adjoining proprietor;⁶ and

¹ *Rex v. Pagham*, 8 B. & C. 355; *Rex v. Trafford*, 1 B. & Ad. 874; 8 Bing. 204; *Gerrish v. Clough*, 48 N. H. 9, 13; *Hall on the Seashore* (2d ed.), 167, 168. If A. by banks or trenches diverts more than the natural flow of the stream upon the land of B., the latter may remedy it by erecting banks upon his own land. *Merritt v. Parker, Coxe* (N. J.) 460.

² *Rex v. Trafford*, *supra*; *Menzies v. Breadalbane*, 3 Wils. & Shaw, 243; 3 Bligh, n. s. 414; *Gerrish v. Clough*, 48 N. H. 9, 13.

³ *Ibid.*; *Mason v. Shrewsbury Railway Co.*, L. R. 6 Q. B. 578, 582; *Burwell v. Hobson*, 12 Gratt. 322.

⁴ *Menzies v. Breadalbane*, 3 Wils. & Shaw, 235; 3 Bligh, n. s. 414; *Rex v. Commissioners of Sewers*, 2 B. & C. 355; *Rex v. Pagham*, 8 B. & C. 355; *Rex v. Trafford*, 1 B. & Ad.

874; 8 Bing. 204; *Farquharsen v. Farquharsen*, 3 Bligh, n. s. 421; *Avery v. Empire Woolen Co.*, 82 N. Y. 582; *Jones v. Soulard*, 24 How. 41; *Rix v. Johnson*, 5 N. H. 520; *Gerrish v. Clough*, 48 N. H. 9; *Adams v. Barney*, 25 Vt. 225; *Tuthill v. Scott*, 43 Vt. 525; *Rood v. Johnson*, 26 Vt. 64, 72; *Harding v. Whitney*, 40 Ind. 379; *Merritt v. Parker, Coxe* (N. J.) 460; *Pierce v. Kinney*, 59 Barb. 56; *Slater v. Fox*, 5 Hun. 544; *Mailhot v. Pugh*, 30 La. Ann. 1359; *New Orleans v. Henderson*, 5 La. 423.

⁵ *Jones v. Turner*, 46 Barb. 527.

⁶ *Farquharsen's case*, cited 3 Wils. & Shaw, 235; *Morr. Dict.* 12, 787; *Attorney General v. Lonsdale*, L. R. 7 Eq. 387; *Bickett v. Morris*, 1 H. L. Sc. 47, affirming *Aberdeen v. Menzies*, *Morr. Dict.* 12, 787; *Blantyre v. Doon*, 10 Dunlop, 542; *Hamilton v.*

while mere apprehension of danger is not sufficient to support an action for this cause, yet any operation extending into the stream itself is *prima facie* an encroachment upon the common interest of the other riparian proprietors, and the burden is upon the party doing such act to show that it is not injurious.¹ If a sea-wall or embankment is erected in tide-waters beyond the limits of the owner's land, it is doubtless illegal at common law as being a purpresture, since it does not appear that littoral proprietors are authorized, as against the Crown or without its sanction, to erect even defences against the sea below high-water mark.² In this country, it is doubtless a principle of general application, as has been expressly held in Wisconsin, that, as a right of necessity, when water, navigable or not navigable, is by natural causes wearing away and intruding upon the banks, the riparian owner, whether he owns the soil *ad filum aquae* or not, may, as against the public, intrude into the shoal unnavigable water near the banks so far as may be necessary for the purpose of constructing works essential to the protection of his land against the action of the water.³ Such

Eddington, Morr. Dict. 12, 826; Burnis v. Brown, Hume's Dict. 504; Gelathy's Case, 1 Macph. 592; Menzies v. Breadalbane, 3 Wils. & Shaw, 235; New Albany Railroad Co. v. Higman, 18 Ind. 77; Niles Works v. Cincinnati, 2 Disney (Ohio) 400; Longstreet v. Harkrader, 17 Ohio St. 23; Cincinnati Railroad Co. v. Abr, 2 Sup. Ct. (Ohio) 515; Ten Eyck v. Delaware Canal Co., 3 Harr. (N. J.) 200; Tinsman v. Delaware Railroad Co., 2 Dutch. 148.

¹ Bickett v. Morris, 1 H. L. Sc. 47; Attorney General v. Lonsdale, L. R. 7 Eq. 387; Attorney General v. Terry, L. R. 9 Ch. 425; Orr Ewing v. Colquhoun, 2 App. Cas. 839; Brownlow v. Metropolitan Board of Works, 13 C. B. N. s. 768; 16 Id. 546; Cracknell v. Thetford, L. R. 4 C. P. 629; Wishart v. Wyllie, 1 Macq. 389; Brown v. Gagy, 2 Moo. P. C. 341; Norbury v. Kitchen, 15 L. T. N. s. 501; Norway Plains

Co. v. Bradley, 52 N. H. 86. If the bank of a stream is washed away, and its bed widened by a flood, a corporation which has the franchise of a toll bridge across the river, and is required by its charter to keep the bridge in repair, is bound to extend the bridge to the new bank. Commonwealth v. Dearfield, 6 Allen, 449. In an action to recover damages for taking stones from a river, and thereby causing the plaintiff's land to be washed away, evidence that the removal of stones at another part of the river produced the same effect is not admissible, unless it appears affirmatively that the conditions are the same. Hawks v. Charlestown, 110 Mass. 110.

² Coulson & Forbes on Waters, 33.

³ Diedrich v. Northwestern Railway Co., 42 Wis. 248; Delaphine v. Chicago Railway Co., 11 Id. 214; Boor-

structures are public nuisances if they interfere with the navigation.¹

§ 161. The owner of the soil of navigable waters is not liable to keep it free from obstructions or to compensate the adjoining owners for damage done by overflow of the water, even when toll is taken for navigating thereon.² But liability to cleanse a river may arise from prescription.³ So, a littoral proprietor may be bound by prescription to maintain and repair a sea-wall, even against extraordinary tides or floods;⁴ but the mere fact that he has always maintained a wall in front of his own land, and that adjoining proprietors have not, because of its existence, found it necessary to erect walls against their own frontages, is not sufficient evidence to establish this liability.⁵ The owner of land, upon which exists a natural barrier against the sea, may also be restrained from destroying or removing it,⁶ upon proceedings on behalf of the Crown or public, if not of individuals

man *v.* Sunnachs, *Ibid.* 233; *Olson v. Merrill*, *Ibid.* 203.

¹ *Bickett v. Morris*, 1 H. L. Sc. 47; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Attorney General v. Terry*, L. R. 9 Ch. 425; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Atlee v. Packet Co.*, 21 Wall. 389; 2 *Dillon*, 479; *Diedrich v. Northwestern Railway Co.*, 42 Wis. 248.

² *Hodgson v. York*, 28 L. T. N. S. 836; *Cracknell v. Thetford*, L. R. 4 C. P. 629; *Parrett Navigation v. Robins*, 10 M. & W. 593; *Bridge's Case*, 10 Rep. 33; *Coulson & Forbes on Waters*, 84.

³ *Lynn v. Turner*, Cowper, 86.

⁴ *Reg v. Leigh*, 10 Ad. & El. 398; *Henley v. Lyme*, 2 Cl. & Fin. 331; *Rex v. Commissioners of Sewers*, 8 T. R. 312; *Keighley's Case*, 10 Coke, 139; *Rooke's Case*, 5 Coke, 99; *Case of the Isle of Ely*, 10 Coke, 140; *Wingate v. Waite*, 6 M. & W. 739; *Reg. v. Wharton*, 2 B. & S. 719; *Rex v. Commissioners of Sewers*, 1 B. & C. 477; *Griffith's Case*, Moore, 62; *Nitro-Phosphate Co. v. London Docks*, 9

Ch. D. 503, 921; *River Wear Commissioners v. Adamson*, 2 App. Cas. 750, 780; *Reg. v. Baker*, L. R. 2 Q. B. 621; *Rex v. Paul*, 2 M. & R. 307; *Morland v. Cooke*, L. R. 6 Eq. 252; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279; *Callis on Sewers*, 107, 151; *Coulson & Forbes on Waters*, 27-32; *Hunt on Boundaries* (2d ed.), 37.

⁵ *Hudson v. Tabor*, 2 Q. B. D. 290; *Attorney General v. Tomline*, 12 Ch. D. 214; *Collins v. Macon* (Ga.), 27 Alb. L. Journ. 116. It seems that a covenant to repair a sea-wall runs with the land, and would therefore bind a purchaser even without notice express or implied. *Morland v. Cooke*, L. R. 6 Eq. 252.

⁶ *Ibid.*; *Attorney General v. Tomline*, 12 Ch. D. 214; *Crompton v. Lee*, 31 L. T. N. S. 469; *Philadelphia v. Scott*, 81 Penn. St. 80, 88; *Commonwealth v. Alger*, 7 Cush. 53, 86; *Crowley v. Copley*, 2 La. Ann. 390; *Watson v. Marshall*, 16 La. Ann. 231; *Leblanc v. Pittman*, 26 La. Ann. 433; *O'Connor v. Stewart*, 19 La. Ann. 127.

liable to sustain peculiar injury. But riparian proprietors are not required to pen in the water by artificial barriers for the benefit of their neighbors.¹ There is no duty resting upon the owner of an artificial canal, analogous to that imposed on the owners of a natural watercourse, not to impede the flow of the water; and, if the overflow of a neighboring river increases the water of the canal to the injury of his premises adjoining, he may pen up the canal, and thus exclude the water from his premises, and will not be liable to a neighbor whose land he thus causes to be flowed.²

§ 162. The general rules by which alluvion is apportioned between different riparian owners are analogous to those applied in the division of flats between the proprietors of lands on the sea-shore owning to low-water mark.³ In all cases, when practicable, every proprietor is entitled to a frontage of the same width on the new shore as on the old shore, and at low-water mark as well as high-water mark,⁴ without regard to the side lines of the upland, unless referred to as guides in particular grants,⁵ or established as boundaries by the agreement or conduct of the conterminous proprietors,⁶ or the acts of public authorities.⁷ "In

¹ *Ibid.*

² *Nield v. London Railway Co., L. R. 10 Ex. 4.*

³ *Deerfield v. Arms*, 17 Pick. 41, 44; *Wonson v. Wonson*, 14 Allen, 85; *Thornton v. Grant*, 10 R. I. 477, 489.

⁴ *Ibid.*; *Gray v. Deluce*, 5 Cush. 9, 12; *Walker v. Boston & Maine Railroad*, 3 Cush. 23; *Porter v. Sullivan*, 7 Gray, 443; *Attorney General v. Boston*, 12 Gray, 558; *Valentine v. Piper*, 22 Pick. 96; *Wonson v. Wonson*, 14 Allen, 71, 79; *Stone v. Boston Steel & Iron Co., Id.* 230; *Knight v. Wilder*, 2 Cush. 209; *Kennebec Ferry Co. v. Bradstreet*, 28 Maine, 374.

⁵ *Ibid.*; *Rust v. Boston Mill Corporation*, 6 Pick. 169; *Dawes v. Prentice*, 16 Pick. 435, 442; *Piper v. Richardson* 9 Met. 158; *Curtis v. Francis*, 9 Cush. 427, 438; 9 Gray, 522; *Win-*

nismet Co. v. Wyman, 11 Allen, 432; *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230, 234; *Clark v. Campau*, 19 Mich. 325; *Emerson v. Taylor*, 9 Maine, 43.

⁶ *Ibid.*; *Adams v. Boston Wharf Co.*, 10 Gray, 521; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553, 560; *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230, 234; *Sparhawk v. Bullard*, 1 Met. 95; *Breed v. Breed*, 117 Mass. 593, 596; 110 Mass. 532; *Central Wharf v. India Wharf*, 123 Mass. 561, 567; *Jones v. Boston Mill Co.*, 6 Pick. 148; *Rider v. Thompson*, 23 Maine, 243; *Treat v. Chipman*, 35 Maine, 34; *Thornton v. Foss*, 26 Maine, 405.

⁷ *Ibid.*; *Brimmer v. Long Wharf*, 5 Pick. 135; *Valentine v. Piper*, 22 Pick. 95; *Piper v. Richardson*, 9 Met. 163; *Wheeler v. Stone*, 1 Cush. 319;

general," says Merrick, J.,¹ "where there are no circumstances or peculiarities in the formation of the shore or the course of the channel, the lines of division are to be made to the channel in the most direct course from the lateral boundaries of the several tracts of upland to which the flats are appended." So, also, in the case of unnavigable streams which are the property of the riparian proprietors *usque ad filum aquae*, the side lines are extended to the centre of the stream from the termini on the bank at right angles with the general course of the river, unless varied by the terms of the conveyance under which the proprietors hold.²

§ 163. When the general course of the shore or river bank approximates to a straight line, alluvial deposits as well as flats are divided among the conterminous proprietors by lines perpendicular to the general course of the original bank, or of the original high-water mark of the shore.³ When it curves or bends, two objects are to be kept in view: namely, to give to each proprietor a fair share of the land, and to secure to him convenient access to the water from all parts of his land by giving him a share of the outward line proportioned to the share of the line of high-water mark or original shore owned by him.⁴ In such case, the general rule is to measure the whole extent of high-water mark or of

Commonwealth v. Alger, 7 Cush. 53, 73; Drake v. Curtis, 9 Cush. 447; 9 Gray, 523.

¹ Attorney General v. Boston Wharf Co., 553, 558; Ashby v. Eastern Railroad Co., 5 Met. 368; Walker v. Boston & Maine Railroad, 3 Cush. 1, 23.

² Knight v. Wilder, 2 Cush. 199; Batchelder v. Keniston, 51 N. H. 496; Bay City Gaslight Co. v. Industrial Works, 28 Mich. 182; Clark v. Campau, 19 Mich. 325; Miller v. Hepburn, 8 Bush, 326; Wood v. Appal, 63 Penn. St. 210; Irwin v. Towne, 42 Cal. 326; People v. Schermerhorn, 19 Barb. 540. See Inhabitants of Ipswich, Petitioners, 13 Pick. 431; Au Gres Boom Co. v. Whitney, 26 Mich. 42.

³ Note 4 above; Sparhawk v. Bul-

lard, 1 Met. 106; Knight v. Wilder, 2 Cush. 209; Porter v. Sullivan, 7 Gray, 443; Wonson v. Wonson, 14 Allen, 71, 79; Batchelder v. Keniston, 51 N. H. 496, 498; Delaware Railroad Co. v. Hannon, 37 N. J. L. 276; Miller v. Hepburn, 8 Bush, 326; Rice v. Ruddiman, 10 Mich. 125; Clark v. Campau, 19 Mich. 325; Bay City Gaslight Co. v. The Industrial Works, 28 Mich. 182; Graves v. Fisher, 5 Maine, 69. See Crook v. Seaford, L. R. 6 Ch. 551; L. R. 10 Eq. 678; Newton v. Eddy, 23 Vt. 319; Delord v. New Orleans, 11 La. Ann. 699; Michon v. Gravier, Ibid. 596.

⁴ Deerfield v. Arms, 17 Pick. 41, 45; Batchelder v. Keniston, 51 N. H. 496.

the ancient line along the shore; to then divide the line of low-water mark, or, in the case of alluvion, the newly formed water line into equal parts, corresponding in number to the feet or rods ascertained by the above measurement; and, after apportioning to each proprietor as many of these parts as he owned feet or rods on the old line, to draw lines from the original termini of the boundaries of the upland to the points of division on the newly formed line, or, in the case of flats, on the line of low-water mark.¹ If, for example, the shore line, before the formation of alluvion, was two hundred rods in length, A's share being one hundred and fifty rods and B's fifty, and the new shore line is but one hundred rods in length, then A would take seventy-five rods and B twenty-five rods of that line; and the division of the land would be completed by running a line from the bound between the parties on the old line to the points thus determined on the new line.² If, instead of curving inward towards the land, the course of the shore bends outward, the dividing lines diverge and each proprietor has a correspondingly greater width towards the water than towards the land.³

§ 164. In *Deerfield v. Arms*,⁴ Shaw, C. J., in apportioning alluvion by converging lines according to the above rule, remarks that where the shore is elongated by deep indentations or sharp projections, its length should be reduced by an equitable and just estimate to the general available line of the land upon the water. In *Rust v. Boston Mill Corporation*,⁵ in Massachusetts, flats were to be divided

¹ *Deerfield v. Arms*, 17 Pick. 41; *Batchelder v. Keniston*, 51 N. H. 496; *Jones v. Johnson*, 18 How. 150; *Johnson v. Jones*, 1 Black, 209.

² *Batchelder v. Keniston*, 51 N. H. 496, 498.

³ *Gray v. Deluce*, 5 Cush. 9, 12, 13; *Porter v. Sullivan*, 7 Gray, 443; *Emerson v. Taylor*, 9 Maine, 46; *Clark v. Campan*, 19 Mich. 325.

⁴ 17 Pick. 41, 46. See *Irwin v. Towne*, 42 Cal. 326.

⁵ *Rust v. Boston Mill Corporation*,

6 Pick. 158. This rule is approved by other courts in *Johnson v. Jones*, 1 Black, 209; *O'Donnell v. Kelsey*, 10 N. Y. 412; 4 Sand. 202; *Miller v. Hepburn*, 8 Barb. 332; *Nott v. Thayer*, 2 Bosw. 10; *Furman v. New York*, 10 N. Y. 537; 5 Sand. 16; *Thornton v. Grant*, 10 R. I. 477, 488; *Aborn v. Smith*, 12 R. I. 370; *Batchelder v. Keniston*, 51 N. H. 496, 499. See, also, *Deerfield v. Arms*, 17 Pick. 45; *Sparhawk v. Bullard*, 1 Met. 107; *Ashby v. Eastern Railroad Co.*, 5 Met. 369;

lying within a deep cove, out of which the tide ebbed at low water, and the mouth of which was so narrow that it was impossible to make the division among the several proprietors by parallel lines; and it was made by running converging divisional lines from high-water mark to points upon a base line across the mouth of the cove, the points being fixed by giving to each proprietor a width upon the base line proportional to the width of his shore line. In *Gray v. Deluce*,¹ the shore of a shallow cove formed a long curve, and the flats were divided, as if the line of the shore had been straight, by drawing parallel lines from the ends of the division lines of the upland to low-water mark in such a manner that they intersected at right angles a base line

Piper v. Richardson, 9 Met. 158; *Wheeler v. Stone*, 1 Cush. 315; *Knight v. Wilder*, 2 Cush. 209; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Attorney General v. Boston Wharf Co.*, 12 Gray, 560; *Berry v. Raddin*, 11 Allen, 579; *Boston v. Richardson*, 13 Allen, 151; 105 Mass. 360; *Nichols v. Boston*, 98 Mass. 41; *Charlestown v. Tufts*, 111 Mass. 351; *Tufts v. Charlestown*, 117 Mass. 402. In *Walker v. Boston & Maine Railroad*, 3 Cush. 1, 25, it was said that there is probably no reason why, upon the principle of giving an equal division, the lines, after passing the mouth of a narrow and shallow cove, should not widen and spread in proportion to low-water mark. In Maine the following rule of apportionment has been adopted: Draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners, at right angles with such base line, to low-water mark. If the line of the shore is straight, the side lines of the lots thus drawn to low-water mark will be identical; but if, by reason of the curvature of the shore, they diverge from or conflict with each other, the land enclosed or excluded by both lines is to be equally divided between the adjoining pro-

prietors. *Emerson v. Taylor*, 9 Maine, 42; *Kennebec Ferry Co. v. Bradstreet*, 28 Maine, 374; *Treat v. Chipman*, 35 Maine, 34; *Call v. Lowell*, 40 Maine, 31. This rule, being more difficult of application than that adopted in Massachusetts, has been less favorably received in other States. See *Thornton v. Grant*, 10 R. I. 477, 488, and authorities above cited; *Gray v. Deluce*, 5 Cush. 9, 13.

¹ 5 Cush. 9. The fact that in this case it does not appear whether the low-water line, which in this State is the boundary of the lands adjoining tide waters, under the ordinance of 1647 (*post*, § 169), was in any part within the base line, is not necessarily material. *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230. See, also, *Commonwealth v. Alger*, 7 Cush. 53, 69, 79; *Adams v. Boston Wharf Co.*, 10 Gray, 521, 530; *Attorney General v. Boston Wharf Co.*, 12 Gray, 557; *Wonson v. Wonson*, 14 Allen, 71, 79, 83; *Boston v. Richardson*, 105 Mass. 358; *Stockham v. Browning*, 18 N. J. Eq. 390; *Delaware Railroad Company v. Hannon*, 37 N. J. L. 276; *Tharton v. Grant*, 10 R. I. 477; *Aborn v. Smith*, 12 R. I. 370; *Clark v. Campau*, 19 Mich. 325; *Miller v. Hepburn*, 8 Bush, 326.

across the mouth of the cove. If there are adjoining coves, the side lines of which would conflict, if so drawn, the line between them is projected at an equal angle to the base line of each cove.¹ These rules may be varied by agreement between the owners of the shore or by long-continued acquiescence in other assumed boundary lines.² Lines, for example, which were established by a partition according to other rules, but affirmed by the court and acquiesced in during thirty-five years by the parties, were held to be the true boundaries.³ If a cove or inlet is so irregular in outline, and so traversed by crooked channels from which the tide does not ebb, that none of the foregoing rules are applicable, the only course is to so divide the flats as to give to each proprietor a fair and equal proportion by as near an approximation to these rules as is practicable.⁴

§ 165. In *Thornton v. Grant*,⁵ in Rhode Island, the question was whether the defendants were so constructing a wharf as to encroach upon the plaintiffs' water front. It was not contended that the wharf, if constructed as proposed, would extend across the division line between the plaintiffs' and defendants' lands, if that line were prolonged; but it was claimed that the prolongation of that line was not the proper limit of the plaintiffs' water front, owing to the conformation of the shore. Durfee, J., in delivering the opinion of the court, referred to the foregoing rules, and said: "In the case before us we are not called upon to partition alluvion or flats, but to determine the extent of the plaintiffs' water front. The principle involved, however, is very much the same in the one case as in the other; and we are therefore not insensible to the guidance to be derived from the

¹ *Wonson v. Wonson* 14 Allen, 71.

² *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Valentine v. Piper*, 22 Pick. 85; *Piper v. Richardson*, 9 Met. 155; *Sparhawk v. Bullard*, 1 Met. 195.

³ *Adams v. Boston Wharf Co.*, 10 Gray, 521; *Winnisimmet Co. v. Wyman*, 11 Allen, 432. If opposite riparian owners agree upon a boundary

line as to land under water which they are about to fill, and one of them fills to this line, the other is estopped to deny that it is the true boundary. *Lavery v. Moore*, 32 Barb. 347.

⁴ *Walker v. Boston & Maine Railroad Co.*, 3 Cush. 1.

⁵ 10 R. I. 477, 489. See *Rush v. Jackson*, 24 Cal. 308; *Arden v. Kermit*, Anth. N. P. 112.

decisions cited. But those decisions do not establish any one invariable rule, and it is quite evident that no one of the several rules which they do suggest could be applied in all cases without sometimes working serious injustice. In the case at bar a solid rock projecting out to the main channel has preserved the shore of the plaintiffs from detrition at that point, but has allowed quite a deep inward curve beyond that point, while the shore of the defendants, having no such protection, has conformed more to the course of the river. The consequence is, that if we draw a front line from headland to headland, and then draw the division line so as to give to each set of proprietors a length of front line proportionate to the length of their original shore, the division line will pass diagonally across what would ordinarily be regarded as the water front of the defendants' land. This is a result which does not commend itself to us as either reasonable or just. We have decided upon another rule, which to us seems equitable, and which, for our present purposes, in the circumstances of this case, leads to a pretty satisfactory result. The rule is this: Draw a line along the main channel in the direction of the general course of the current in front of the two estates, and from the line so drawn, and at right angles with it, draw a line to meet the original division line on the shore. This rule is not unlike the rule adopted in *Gray v. Deluce*.¹ It will give the plaintiffs as large an extent of water front as we are disposed to allow them; and upon the front so defined we will grant them an injunction to prevent the defendants from encroachments." In *Aborn v. Smith*,² in the same State, it was held, in pursuance of the rule laid down in *Gray v. Deluce*³ and *Thornton v. Grant*,⁴ that the boundaries of riparian estates, the proprietors of which are entitled to reclaim a curving shore to a harbor

¹ 5 Cush. 9; *ante*, § 164.

² 12 R. I. 370; 11 R. I. 594. As to the jurisdiction of equity in such cases, see *Id.* 11 R. I. 594; 1 Story, Eq. Jur. § 610; *Willard v. Magoon*, 30 Mich. 282; *Perry v. Pratt*, 31 Conn. 433.

³ 5 Cush. 9; *ante*, § 164.

⁴ 10 R. I. 477, *above cited*. In *Bay*

City Gaslight Company v. Industrial Works, 28 Mich. 182, it was held that a dock line which was not parallel either with the thread of the stream or with the shore did not interfere with the application of the rule extending boundaries at right angles to the thread of the stream.

line established by law, are to be determined by running a line from the terminus of the upland boundary perpendicularly to the harbor line. In *Davidson v. Boston & Maine Railroad*,¹ in Massachusetts, it was held that one who owns a tide mill, and is also the proprietor of flats in front of his mill, which are uncovered by the tide, is not entitled, as against adjoining proprietors or the public, to the free flow of the tide over his flats for the use of his mill or for navigation; and that damage caused to him by the obstruction of the flow of tide water, in consequence of the extension of solid structures upon the adjoining flats, which do not wholly cut off the access to his land, is *damnum absque injuria*.

§ 166. When islands are formed by either the sudden or gradual action of tide waters within the territory of the nation, they belong to the Crown at common law, and in this country to the respective States.² The same is true of the navigable fresh waters of this country belonging to the State,³ except that, when shoals, sandbars, or islands form along the margin of the water, it is a question of fact for the jury whether they are the property of the State or of the riparian owners as accretions.⁴ In the case of unnavigable fresh-water streams, and of navigable fresh rivers where these are held to belong to the riparian proprietors subject to the public right of navigation, the formation, if gradual and imperceptible, is the property of the riparian proprietors,

¹ 3 Cush. 91.

² *Ante*, § 6; Hale, *De Jure Maris*, c. 4; Hargrave's *Law Tracts*, 37; *Middletown v. Sage*, 8 Conn. 221; *Tracy v. Norwich Railroad Co.*, 39 Conn. 382. In Missouri, unnamed and unsurveyed islands in the Mississippi River are held to belong to the United States and not to the State. *Adams v. St. Louis*, 32 Mo. 25; *Benson v. Morrow*, 61 Mo. 345. This seems, however, contrary to the current of authority. *Pollard v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Peters, 367; *Barney v. Keokuk*, 94 U. S. 324. As to the power of the governors of

Mexico to grant islands near the coast, see *United States v. Castillero*, 23 How. 464; *United States v. Osio*, Id. 273; 1 Hoffm. 100. In Texas, see *State v. Delesdenier*, 7 Texas, 76; *Tabor v. Commissioner*, 29 Texas, 508; *Cowan v. Hardeman*, 26 Texas, 217.

³ *Ibid.*; *ante*, c. 3; *Stover v. Jack*, 60 Penn. St. 339; *Hartley v. Crawford*, 81 Penn. St. (Pt. 2), 478. If a body of land is surrounded by water in its flow in an ordinary stage, it is an island, although at some periods of the year the water may not pass. *Stover v. Jack*, 60 Penn. St. 339.

⁴ *Ante*, § 77.

whether this alluvion is added to the shore or bank, or forms in the bed of the river and becomes an island.¹ When an island is so formed in the bed of a private river as to divide the channel and to lie partly on each side of the thread of the stream, if the land on the opposite sides of the river belongs to different proprietors, the island is divided between them in severalty to the extent of their lands in length according to the original thread or medium line between the banks of the river, when the water is in its natural and ordinary stage, without regard to the channel or deepest part of the stream.² If it is altogether on one side of the dividing line, it belongs to the owner of the bank on that side.³ When formed by a sudden change in the course of the river, or by the violent action of the sea, as by encircling a field, or cutting off a point of land or peninsula, it remains the property of the former owner.⁴ If an island in a private river has been lawfully appropriated by another person, or reserved in a grant, the thread of the stream midway between the island and the fast land is the boundary of the adjoining owner's title.⁵ A stream, in passing islands, may thus have

¹ *Deerfield v. Arms*, 17 Pick. 41, 43.

² *Hale, De Jure Maris*, c. 6; *Hargrave's Law Tracts*, 37; 2 Black. Com. 261; 3 Kent Com. 428; *Deerfield v. Arms*, 17 Pick. 41, 43; *Ingraham v. Wilkinson*, 4 Pick. 268; *Bardwell v. Ames*, 22 Pick. 333; *Hopkins Academy v. Dickinson*, 9 Cush. 544, 552; *Granger v. Avery*, 64 Maine, 292; *Lodge v. Lee*, 6 Cranch, 237; *McCulloch v. Wall*, 4 Rich. (S. C.) 68; *Canal Commissioners v. People*, 5 Wend. 423, 443; *People v. Canal Appraisers*, 13 Wend. 355; *Luce v. Carley*, 24 Wend. 451; *Walton v. Tift*, 14 Barb. 216; *Greenleaf v. Kilton*, 11 N. H. 530; *Nichols v. Suncook Manuf. Co.*, 34 N. H. 345, 349; *Ridgely v. Johnson*, 1 Bland Ch. 316, n.; *Giraud v. Hughes*, 1 Gill & J. 249.

³ *Ibid.*; *Ingraham v. Wilkinson*, 4 Pick. 268; *Claremont v. Carlton*, 2 N. H. 369; *Kimball v. Schoff*, 40 N. H. 190, 194; *Cooper's Just. lib. 2, t.*

3; *Schultes's Aquatic Rights*, 119. Where an island divides a stream so that only one-fourth of the water passes on one side, the riparian owner on that side is entitled to use all the water flowing in that channel. *Crooker v. Bragg*, 10 Wend. 260.

⁴ *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Hale, De Jure Maris*, c. 6; *Fleta*, lib. 3, c. 2, §§ 6, 8; *Woolrych on Waters*, 28, 36; 1 *Swift's Dig.* 111, 112; *Schultes's Aquatic Rights*, 119, 120.

⁵ *McCulloch v. Wall*, 4 Rich. (S. C.) 68; *Stolp v. Hoyt*, 44 Ill. 219; *Missouri v. Kentucky*, 11 Wall. 395; *Claremont v. Carlton*, 2 N. H. 369, 373; *Stanford v. Mangin*, 30 Ga. 355; *Penobscot Tribe v. Veazie*, 58 Maine, 402; *Watson v. Peters*, 26 Mich. 508; *Walker v. Board of Public Works*, 16 Ohio, 544; *Branham v. Blencoe Creek Turnpike Co.*, 1 Lea (Tenn.) 704; *Fleta*, lib. 3, c. 2, §§ 6, 8. As to what

two or more threads. "If," says Schultes,¹ "between an island which lies nearest and belongs to a neighboring estate, and the contrary bank of a neighbor, which is on the other side of the stream, another island shall arise, then the admeasurement of property shall be made from the first island, and not from the estate to which it is apportioned by vicinity." In an action brought to recover possession of an island in the Wabash River in Indiana, claimed by the owner of the adjacent land on the south side of the stream as an accretion caused by the partial filling up of the channel on his side of the river, evidence that the defendants were in continuous adverse possession for more than twenty years prior to the commencement of the suit, and had purchased from the United States in 1857, after a survey ordered in 1849 and made in 1850; that, at the time of the plaintiff's purchase in 1837, it had been omitted from the survey, except to designate its location, and that he never had possession or exercised acts of ownership over the same, or asserted title thereto before the action, was held sufficient to support a verdict in favor of the defendants.²

§ 167. When a wharf or building is extended into the water, two questions arise in determining the legality of the structure: First, whether it is a purpresture, which depends upon the ownership of the soil which it covers;³ second, whether it is a public nuisance, as interfering with

boundaries in particular grants include islands, see *Ibid.*; *Lunt v. Holland*, 14 Mass. 151; *People v. Canal Appraisers*, 13 Wend. 355; *Walton v. Tift*, 14 Barb. 216; *Clarke v. Wagner*, 76 N. C. 463; *Claremont v. Carlton*, 2 N. H. 369; *Kimball v. Schoff*, 40 N. H. 190; *Hartley v. Crawford*, 81 Penn. St. (Pt. 2). 478; *Johns v. Davidson*, 16 Penn. St. 512. As between States, see *Handly v. Anthony*, 5 Wheat. 374; *Howard v. Ingersoll*, 13 How. 381; *Missouri v. Iowa*, 7 How. 660; *Missouri v. Kentucky*, 11 Wall. 395. A grant which purported to convey "an island com-

monly called and known by the name of the Green Flats," was held to convey the Green Flats, though usually submerged and not strictly an island. *Brink v. Richtmyer*, 14 Johns. 255. A grant of a "river" does not convey either the river bed or islands formed therefrom. *Jackson v. Halstead*, 5 Cowen, 216; *ante*, § 31.

¹ *Aquatic Rights*, 119; *Bract. lib.* 2, c. 2; *Fleta*, lib. 3, c. 2, §§ 6, 8; *Digest*, 41, t. 1, § 56.

² *Bonewits v. Wygant*, 75 Ind. 41.

³ *Ryan v. Brown*, 18 Mich. 196; *ante*, c. 1.

the common rights of navigation and fishery. By the common law, as already stated, any encroachment upon the property of the Crown in tide waters below the high-water mark might be seized by the king as an unauthorized addition to his lands, or it might be abated at his discretion without regard to the question whether it was also a public nuisance.¹ By the common law of England there is no general right, as incident to the ownership of the adjoining lands, and in the absence of a grant from the Crown or of prescription, which presupposes a grant, to extend wharves beyond the ordinary high-water mark of tide waters; and there is no authority in England for the position that a simple purpresture is indictable.²

§ 168. In this country this rule is subject to reasonable limitations, and the common rights of the people in these waters, both before and since the Revolution, may be said generally to be confined to what is of public use;³ while the owners of lands adjoining navigable waters are permitted to enjoy what remains of the rights and privileges in the soil beyond their strict boundary lines, after giving to the public the full enjoyment of their rights.⁴ There is no general jurisdiction vested in the courts of the country analagous to that exercised by the English Court of Exchequer in equity.

¹ Hale, *De Jure Maris*, c.3,6; Hargrave's *Law Tracts*; *Attorney General v. Parmeter*, 10 Price, 378; *Attorney General v. Richards*, 2 Anst. 603; *Attorney General v. Johnson*, 2 Wils. Ch. 87; *ante*, § 21.

² *Ibid.*; *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Gough v. Bell*, 22 N. J. L. 441, 477.

³ *Burrows v. Gallup*, 32 Conn. 493, 500; *Dutton v. Strong*, 1 Black, 23, 32; *Commonwealth v. Charlestown*, 1 Pick. 180, 186; *Commonwealth v. Alger*, 7 Cush. 53; *Clement v. Burns*, 43 N. H. 618; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532; *Providence Steam Engine Co. v. Providence*

Steamboat Co., 12 R. I. 348; *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631; *Alden v. Pinney*, 12 Fla. 348; *People v. St. Louis*, 5 Gilman, 351.

⁴ *Ibid.* Under the civil law one might construct an enclosure by the sea, lower than the high-water mark, or even than the low-water mark, and possess the ground within the limits of the enclosure, because he is able to exercise an exclusive control over it; but if the water swept away his enclosure, his exclusive control was lost, and with it all his rights of ownership. Hadley's *Int. to Roman Law*, 158; Goudsmit's *Roman Law*, 113, note.

The business department of that court being divided between equity and law, included upon the equity side the investigation of purprestures in connection with the charge and collection of the public revenues, and the recovery and protection of the Crown lands;¹ while the equity jurisdiction in this country corresponds to that administered by the High Court of Chancery in England, and our courts of equity, being incompetent to ascertain the pleasure of the State whether a naked purpresture should be seized, demolished, or arrented, appear to have rarely attempted the exercise of such power, and it has not, therefore, been always treated as a question of public justice. Upon this ground, the Supreme Court of California decided,² that the district courts of that State had not, by virtue of their equity powers, jurisdiction to order the abatement of a naked purpresture, although the State may of its own motion bring ejectment. In New York it is held that purprestures, like public nuisances, may be abated by the courts upon proceedings on behalf of the people,³ and that a court of chancery may enjoin any such appropriation of public property to private uses as will injuriously affect the public interest.⁴ The question whether a structure erected upon the shore of a harbor or of any salt waters is a purpresture is thus of less practical importance in this country than in England; while the question whether such structure interferes with the public right of navigation, and is a nuisance, is equally important in the two countries. This change of view results in some States from statute; in others, from usages which have acquired the force of law.

¹ 3 Bl. Com. 44; 4 Inst. c. 13; Attorney General v. Richards, 2 Anst. 606; Attorney General v. Parmeter, 10 Price, 378; Attorney General v. Burridge, 10 Price, 378; Attorney General v. Johnson, 2 Wils. Ch. 101.
² People v. Davidson, 30 Cal. 379, 392; Courtwright v. B. R. Co., 30 Cal. 585.

³ People v. Vanderbilt, 26 N. Y.

287; 28 N. Y. 396; 38 Barb. 282; People v. New York Ferry Co., 68 N. Y. 71.

⁴ Ibid.; Attorney General v. Cohoes Co., 6 Paige, 133; Delaware Canal Co. v. Lawrence, 2 Hun, 163; People v. Third Avenue Railroad Co., 45 Barb. 63; 30 How. Pr. 121; People v. St. Louis, 5 Gilman, 351.

§ 169. In Massachusetts the colony ordinance of 1647¹ provided that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietors of the adjoining lands should have property to the low-water mark, where the sea does not ebb above one hundred rods, and not more wheresoever it ebbs further; provided that such proprietors should not have power to stop or hinder the passage of boats or other vessels to other men's houses or lands. This ordinance conveyed to the owners of the upland flats which were within the bounds of towns already established, but not those previously granted to individuals or appropriated to public uses.² It did not in terms extend to other colonies than that of Massachusetts; but it was a settled rule of property throughout the province of Massachusetts, after the union of the colony of Massachusetts with Plymouth and Maine, and also with Nantucket and Martha's Vineyard.³ It applies to the open seashore as well as to the creeks and arms of the sea,⁴ and to islands as well as the main land.⁵ It does not apply to fresh waters, except where, being pressed back by the influx of the sea, they rise and fall with the tide.⁶ It is the law of Maine,⁷

¹ Also denominated the ordinance of 1641; 1647 is probably the correct date. *Commonwealth v. Alger*, 7 Cush. 53, 67; *Commonwealth v. Roxbury*, 9 Gray, 451, and note.

² *Boston v. Richardson*, 105 Mass. 351; *Tappan v. Burnham*, 8 Allen, 65; *Porter v. Sullivan*, 7 Gray, 441; *Commonwealth v. Alger*, 7 Cush. 70; *Berry v. Raddin*, 11 Allen, 577.

³ *Storer v. Freeman*, 6 Mass. 435; *Codman v. Winslow*, 10 Mass. 146; *Parker v. Smith*, 17 Mass. 413; *Barker v. Bates*, 13 Pick. 255; *Sale v. Pratt*, 19 Pick. 191; *Mayhew v. Norton*, 17 Pick. 357; *Commonwealth v. Alger*, 7 Cush. 53, 76; *Weston v. Sampson*, 8 Cush. 347, 354; *Commonwealth v. Roxbury*, 9 Gray, 451, and note, p. 523.

⁴ *Sale v. Pratt*, 19 Pick. 191; *Barker v. Bates*, 13 Pick. 255; *Commonwealth v. Alger*, 7 Cush. 53, 76; *Brackett v. Persons Unknown*, 53

Maine, 238; *Low v. Knowlton*, 26 Maine, 128.

⁵ *Hill v. Lord*, 48 Maine, 83.

⁶ *Lapish v. Bangor Bank*, 8 Maine, 85; *Attorney General v. Woods*, 108 Mass. 436; *ante*, § 44.

⁷ *Knox v. Pickering*, 7 Greenl. 106; *Lapish v. Bangor Bank*, 8 Greenl. 85; *Emerson v. Taylor*, 9 Greenl. 42; *Duncan v. Sylvester*, 24 Maine, 482; *Gerish v. Union Wharf Co.*, 26 Maine, 384; *Thornton v. Foss*, Id. 402; *Low v. Knowlton*, 26 Maine, 128; *Deering v. Long Wharf*, 25 Maine, 51, 64; *Partridge v. Luce*, 36 Maine, 16; *Moulton v. Libbey*, 37 Maine, 485; *Clancey v. Houdlette*, 39 Maine, 451; *Montgomery v. Reed*, 69 Maine, 510; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353; *Moore v. Griffin*, 22 Maine, 350; *Storer v. Freeman*, 6 Mass. 435; *Barrows v. McDermott*, 73 Maine, 441; *Dunlap v. Stetson*, 4 Mason, 349, 366.

and, as a usage, it has been recognized as applicable in New Hampshire.¹ It did not create a mere easement, privilege, or license, but was a grant of the soil to low-water mark;² and the State cannot take the flats of a littoral proprietor above that line, or diminish their value by causing them to be permanently flooded or laid bare, except in the exercise of the right of eminent domain, and by making reasonable compensation.³ One of its chief purposes was to aid commerce, and to give the littoral proprietors convenient wharf privileges; and it is therefore held in Massachusetts that the low-water mark referred to in the ordinance is not the line of ordinary low tide, but that of the lowest ebb, to which it is often necessary to extend wharves in order that they may be enjoyed to the best advantage.⁴ The State still owns the flats beyond that line, and the soil which is permanently submerged;⁵ and the public may use unenclosed flats within that line for navigation,⁶ and may there take fish, as well

¹ *Clement v. Burns*, 43 N. H. 621. See *Nudd v. Hobbs*, 17 N. H. 527.

² *Austin v. Carter*, 1 Mass. 231; *Storer v. Freeman*, 6 Mass. 435; *Codman v. Winslow*, 10 Mass. 146; *Commonwealth v. Alger*, 7 Cush. 53, 70-81; *Fitchburg Railroad v. Boston & Maine Railroad*, 3 Cush. 58; *Walker v. Boston & Maine Railroad Co.*, 3 Cush. 121; *Commonwealth v. Boston & Maine Railroad Co.*, 3 Cush. 43; *Porter v. Sullivan*, 7 Gray, 443; *Commonwealth v. Roxbury*, 9 Gray, 451, 459, and note, p. 518; *Boston v. Le-craw*, 17 How. 432; *Rust v. Boston Mill Corp.*, 6 Pick. 158; *Drake v. Curtis*, 1 Cush. 395, 412; *Gray v. De-luce*, 5 Cush. 9; *Winslow v. Patten*, 34 Maine, 25; *Pike v. Munroe*, 36 Maine, 309; *Parker v. Cutler Mill Dam Co.*, 20 Maine, 353; *Low v. Knowlton*, 26 Maine, 128.

³ *Ibid.*; *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. 467, 482; *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 23 Pick. 360; *Ashby v. Eastern Railroad Co.*, 5 Met. 368; *Haskell v. New Bedford*,

108 Mass. 208; *Drury v. Midland Railroad*, 127 Mass. 571. See *Walker v. Shepardson*, 4 Wis. 486.

⁴ *Sparhawk v. Bullard*, 1 Met. 95, 108; *Storer v. Freeman*, 6 Mass. 435, 438; *Commonwealth v. Charlestown*, 1 Pick. 180, 183; *Commonwealth v. Boston & Maine Railroad Co.*, 3 Cush. 1; *Walker v. Boston & Maine Railroad Co.*, 3 Cush. 24; *Commonwealth v. Roxbury*, 9 Gray, 451, 491, and note; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553, 558; *Wonson v. Wonson*, 14 Allen, 71, 82; *Attorney General v. Wood*, 108 Mass. 436, 440. In Maine the limit under this ordinance is the ordinary low-water mark, as at common law. *Gerrish v. Union Wharf*, 26 Maine, 384.

⁵ *Gray v. Bartlett*, 20 Pick. 186; *Boston Mill Co. v. Newman*, 12 Pick. 476; *Sparhawk v. Bullard*, 1 Met. 95; *Garey v. Ellis*, 1 Cush. 306; *Commonwealth v. Roxbury*, 9 Gray, 451, 499.

⁶ *Boston Steamboat Co. v. Munson*, 117 Mass. 34; *Henshaw v. Hunting*, 1 Gray, 203; *Commonwealth v. Charlestown*, 1 Pick. 189; *Drake v. Curtis*, 1

those which are embedded in the soil as those which are moving in the water.¹ Littoral proprietors may, however, exclude navigation from their own flats by building wharves or other structures to low-water mark, if not prohibited from so doing by the legislature, but have no right to erect structures which materially interfere with the passage of vessels or boats, or cut off the access to the neighboring houses or lands.² By reclaiming flats, or by fixing stakes upon them, they may also exclude the public from exercising the privileges of fishing and fowling, and of digging for shell-fish in the space so occupied.³ A littoral owner takes the adjoining flats as land and not as an incorporeal right,⁴ and his widow is entitled to dower in his flats which are unimproved at his decease.⁵ As land does not pass as appurtenant to land,⁶ it is established under this ordinance: first, that a writ of entry lies for flats, though unenclosed, when the owner is disseized;⁷ second, that trespass *quaere clausum fregit* lies for an injury to the owner's possession of flats;⁸ third, that the owner may convey the flats, or any part of them, without the upland, or the upland without the flats, the question of intention depending upon the terms of the

Cush. 395, 413; *Boston v. Lecraw*, 17 How. 426; *Richardson v. Boston*, 19 How. 263; 24 How. 188; *State v. Wilton*, 42 Maine, 9; *Montgomery v. Reed*, 69 Maine, 510. In the last case, it was held that the public right of navigation over unenclosed flats is not an encumbrance within the common covenant against encumbrances. See, also, *Ballard v. Child*, 46 Maine, 152. A grant of flats by the State, although by warranty deed with a covenant against incumbrances, to a person who agrees to fill them within a certain time, does not extinguish the public right of navigation until the flats are filled. *Boston Steamboat Co. v. Munson*, 117 Mass. 34.

¹ *Proctor v. Wells*, 103 Mass. 216; *Lakeman v. Burnham*, 7 Gray, 437.

² *Boston v. Richardson*, 105 Mass. 365; *Kean v. Stetson*, 5 Pick. 495;

Commonwealth v. Charlestown, 1 Pick. 180; *Barker v. Bates*, 13 Pick. 255; *Deering v. Long Wharf*, 25 Maine, 51; *Davidson v. Boston & Maine Railroad*, 3 Cush. 91.

³ *Locke v. Motley*, 2 Gray, 265; *Ipswich Proprietors v. Herrick*, 9 Gray, 529; *Low v. Knowlton*, 26 Maine, 128.

⁴ *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Alger*, 7 Cush. 77.

⁵ *Brckett v. Persons Unknown*, 53 Maine, 238.

⁶ *Doane v. Broad Street Association*, 6 Mass. 332; *Commonwealth v. Alger*, 7 Cush. 53, 80; *Valentine v. Piper*, 22 Pick. 85; *Piper v. Richardson*, 9 Met. 155.

⁷ *Commonwealth v. Alger*, 7 Cush. 53, 80.

⁸ *Ibid.*; *Austin v. Carter*, 1 Mass. 231.

conveyance.¹ If the grant is expressly bounded by the high-water mark, the grantee is not entitled to the benefit of the ordinance.² But proof of title to the upland is *prima facie* evidence of title to the flats, and the latter are presumed to pass by a grant of the former if the conveyance does not disclose a contrary intent.³ The public may pass over such parts of the shore as are bare and unimproved, without hindrance or liability for damages to the littoral proprietors;⁴ and the public right of fishery in tide waters includes, as above stated, the right to take fish upon the shore to high-water mark.⁵ The State, as representing its citizens, or otherwise, has not such an easement or interest in flats appurtenant to or parcel of the upland, and owned by individuals, as requires a jury, in assessing damages for taking the same for a railroad, to deduct its interest from the ascertained value.⁶ It is not settled whether the ordinance was a recognition of a previously existing usage. In Massachusetts, a grant upon the sea-shore from the colonial government prior to the ordinance did not extend beyond high-water mark without express words.⁷ In Maine it has been held that private conveyances of flats before the ordinance are valid.⁸

§ 170. In Connecticut the privileges of the littoral proprietors, with respect to the shore, depend upon usage,

¹ Lufkin *v.* Haskell, 3 Pick. 356; Mayhew *v.* Norton, 17 Pick. 413; Drake *v.* Curtis, 1 Cush. 395, 413; Porter *v.* Sullivan, 7 Gray, 447; Harts-horn *v.* Wright, Peters C. C. 64; Lapi-sh *v.* Bangor Bank, 8 Greenl. 85; Deering *v.* Long Wharf, 25 Maine, 64; Treat *v.* Strickland, 23 Maine, 234; Pike *v.* Munroe, 36 Maine, 309; Erskine *v.* Moulton, 66 Maine, 276; Stone *v.* Augusta, 46 Maine, 137; Knox *v.* Pickering, 7 Maine, 106. Upon a petition for the partition of land, described as bounded on the sea, the flats as well as the upland are to be divided. Partridge *v.* Luce, 36 Maine, 16.

² Lapi-sh *v.* Bangor Bank, 8 Greenl. 85.

³ Valentine *v.* Piper, 22 Pick. 85; Drake *v.* Curtis, 1 Cush. 395; 2 Dane Abr. 691, 699; 9 Gray, 524; Charles-town *v.* Tufts, 111 Mass. 348; Moore *v.* Griffin, 22 Maine, 350; Nickerson *v.* Crawford, 16 Maine, 245; Winslow *v.* Patten, 34 Maine, 25; Pike *v.* Munroe, 36 Maine, 309.

⁴ State *v.* Wilson, 42 Maine, 9.

⁵ Moulton *v.* Libbey, 37 Maine, 472; Weston *v.* Sampson, 8 Cush. 347.

⁶ Walker *v.* Boston & Maine Rail-road, 3 Cush. 1.

⁷ Commonwealth *v.* Roxbury, 9 Gray, 451, and note; Boston *v.* Richardson, 105 Mass. 351.

⁸ Hill *v.* Lord, 48 Maine, 83.

unaided by ancient statutory provisions. The title of such proprietors extends only to the high-water mark, but they have the exclusive right to construct wharves upon the soil below it, and to reclaim the shore, if they conform to such regulations as the State may impose, and do not obstruct the navigation.¹ They have a right of access to the sea, and the exclusive right of embarkation from their own land, and no other person can lawfully enter upon their lands for this or any other purpose without their permission.² This right of reclamation and wharfage, while unexercised, is a franchise alienable by the owner, and, although it originates in and is derived from the ownership of the adjoining upland, it is not so inseparably attached thereto that a grant of the upland necessarily conveys the franchise.³ When the right has been exercised by reclaiming the shore, the reclaimed portions in general become integral parts of the owner's adjoining land.⁴

§ 171. Similar privileges are accorded to littoral proprietors by the established usages of New Jersey. In this State the legislature may grant any portion of the unenclosed soil of its navigable waters, including the shore, without making compensation to the owners of the adjoining lands.⁵ The latter may reclaim the shore to low-water mark, when this can be done without interfering with the navigation,⁶

¹ *Mather v. Chapman*, 40 Conn. 382; *State v. Sargent*, 45 Conn. 358; *Nichols v. Lewis*, 15 Conn. 137, 143; *Peck v. Lockwood*, 5 Day, 22; *East Haven v. Hemingway*, 7 Conn. 186; *Chapman v. Kimball*, 9 Conn. 38, 41; *Frink v. Lawrence*, 20 Conn. 117; *Groton v. Hurlburt*, 22 Conn. 178; *Simons v. French*, 25 Conn. 346; *Burrows v. Gallup*, 32 Conn. 493; *Church v. Meeker*, 34 Conn. 421; *Lockwood v. New York Railroad Co.*, 37 Conn. 387; *Union Wharf v. Starin*, 45 Conn. 585; *Seeley v. Brush*, 35 Conn. 423.

² *Ibid.*; *State v. Sargent*, 45 Conn. 358, 373.

³ *Simons v. French*, 25 Conn. 346, 352; *Lockwood v. New York Railroad Co.*, 37 Conn. 387.

⁴ *Lockwood v. New York Railroad Co.*, 37 Conn. 387, 391.

⁵ *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532; 20 N. J. Eq. 126; *State v. Jersey City*, 25 *Ibid.* 525, 530; *New York Railroad Co. v. Yard*, 43 N. J. L. 121, 632.

⁶ *Arnold v. Mundy*, 1 Halst. 1, 10, 13; *Bell v. Gough*, 21 N. J. L. 156; 22 *Ibid.* 441; 23 *Ibid.* 624, 669; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532.

but this is a mere license which the legislature may revoke at any time before it is executed.¹ The littoral proprietors have not a legal title to unimproved flats, and cannot, therefore, maintain ejectment therefor,² although they may be protected in equity against an unauthorized encroachment upon them by a stranger, which interferes with their access to the water.³ When the shore is reclaimed, it becomes the property of the littoral proprietor, and cannot be taken for public uses, or granted by the State to other persons, without compensation.⁴ If a structure erected by a littoral proprietor upon the shores of this State does not interfere with the navigation, it is not abateable as a nuisance or purpresture.⁵ It seems that the common understanding in this State carries the right even below low-water mark, provided there is no obstruction to the navigation.⁶ The rights of the littoral

¹ *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532; *State v. Brown*, 27 *Ibid.* 13; *State v. Jersey City*, 1 *Dutch.* 525; *Stewart v. Fitch*, 31 *Ibid.* 17; *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 18 N. J. Eq. 13, 511; *State v. Carragan*, 37 N. J. L. 264, 267; *Pennsylvania Railroad Co. v. New York Railroad Co.*, 23 N. J. Eq. 157; *Townsend v. Brown*, 24 N. J. L. 80; *State v. Jersey City*, 42 N. J. L. 349; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *United New Jersey Railroad Co. v. Standard Oil Co.*, 33 N. J. Eq. 123. See *Rundle v. Delaware Canal Co.*, 14 *How.* 80. A privilege conferred by the legislature upon certain associates to build docks, wharves, and piers in the Hudson River, and when so built to appropriate them to their own use, was held not to be assignable in *Morris Canal Co. v. Central Railroad Co.*, 1 C. E. Green, 419. Adjacency to tide waters, and the enhanced value given to land by reason of its frontage thereon, are circumstances which enter into its taxable valuation. *New York Railroad Co. v. Yard*, 43 N. J. L. 632; *State v. Carragan*, 37 N. J. L. 294; *State v. Jersey*

City, 25 *Id.* 530. But a separate assessment cannot be made on land below high-water mark where such land and the adjacent upland belong to the same person. *State v. Jersey City*, 25 N. J. L. 525; *State v. Collector*, 24 N. J. L. 108.

² *Ibid.* See *Gerrish v. Union Wharf*, 26 *Maine*, 384; *Coburn v. Ames*, 52 *Cal.* 385; *Nichols v. Lewis*, 15 *Conn.* 143; *Aborn v. Smith*, 11 *R. I.* 594; 12 *R. I.* 370.

³ *Ibid.*; *Stockham v. Browning*, 18 N. J. Eq. 390; *State v. Brown*, 27 N. J. L. 13, 648; *Brown v. Morris Canal Co.*, *Ibid.* 648; *Hoboken Land Co. v. Hoboken*, 7 *Vroom*, 540, 550; *Coburn v. Ames*, 52 *Cal.* 385; *Aborn v. Smith*, 11 *R. I.* 594; 12 *R. I.* 370; *Thornton v. Grant*, 10 *R. I.* 477; *O'Donnell v. Kelsey*, 10 *N. Y.* 412, 415.

⁴ *Bell v. Gough*, 21 N. J. L. 156; 22 *Ibid.* 441; 23 *Ibid.* 624; *State v. Jersey City*, 25 *Ibid.* 525; *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 18 N. J. Eq. 511, 13; *O'Neill v. Annett*, 3 *Dutch.* 290, 293.

⁵ *Attorney General v. Delaware Railroad Co.*, 27 N. J. Eq. 1, 631.

⁶ *Elmer, J.*, in *Bell v. Gough*, 3

proprietor with respect to the land under water are mere incidents of the ownership of the shore, and, as such, pass with a grant of the upland.¹

§ 172. In Rhode Island, the right to build wharves in tide waters, not obstructing the channel, appears to have been conceded by an unpublished ordinance passed in 1707.² Whether it originated in this ordinance or in usage, the right of the littoral proprietor to wharf or embank against his land, without license from the State, provided he does not interfere with the navigation, appears to have been long recognized, and is supported by recent decisions in that State.³

§ 173. In Pennsylvania, tidal rivers and the larger fresh streams are alike public property.⁴ In *Tinicum Fishing Co. v. Carter*,⁵ the right of the defendant in error to throw out nets in the Delaware River, and to draw them in on the shore, was obstructed by a pier built out by the plaintiffs in error into the river under license from the board of wardens of the port of Philadelphia, who were empowered to grant such licenses in the interests of navigation. Sharswood, J., thus defines the right to extend wharves under the laws of that State: "The title of the riparian owner, derived by

Zab. 658. See *Townsend v. Brown*, 24 N. J. L. 80; *Associates v. Jersey City*, 4 Hal. Ch. 715. See, also, upon this point, the early Massachusetts case of *Commonwealth v. Crowninshield*, 2 Dane, Abr. 691.

¹ *State v. Brown*, 27 N. J. L. 13.

² See Angell on Tide Waters (2d ed.) 237.

³ *Providence Steam Engine Co. v. Providence Steamboat Co.*, 12 R. I. 348, 363; *Thornton v. Grant*, 10 R. I. 477; *Clark v. Peckham*, 10 R. I. 35, 38.

⁴ *Ante*, § 65.

⁵ 61 Penn. St. 21, 30. See, also, *Hart v. Hill*, 1 Whart. 124, 131, 137; *Commonwealth v. Shaw*, 14 Serg. &

R. 9, 13; *Shrunk v. Schuylkill Navigation Co.*, Id. 81; *Naglee v. Ingersoll*, 7 Penn. St. 185; *Zug v. Commonwealth*, 70 Penn. St. 138; *Philadelphia v. Scott*, 81 Penn. St. 80; *Simpson v. Neill*, 89 Penn. St. 183; *Commonwealth v. Fisher*, 1 Penn. 462; *Klingensmith v. Ground*, 5 Watts, 458; *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206; *Commonwealth v. Church*, 1 Penn. St. 105; *Chess v. Mantown*, 3 Watts, 219; *Cooper v. Smith*, 9 Serg. & R. 26; *Freytag v. Powell*, 1 Whart. 536; *Jones v. Janney*, 8 W. & S. 436; *Frankford v. Lennig*, 7 Phila. 403; *Philadelphia Railroad Co. v. Morris*, Id. 286.

grant from the State, extends to low-water mark, not absolutely indeed in tidal streams, but subject to the public right of passage when the tide is high.¹ He has no right to make any erection between high and low-water mark without express authority from the State; nor, of course, beyond low-water mark, into the bed and channel. The State can grant authority to make such erection, either to the riparian owner or to others, so long as the riparian owner is not thereby deprived of access to and use of the river as a public highway, which is implied, if not expressed, in the grant to him of land bounded on the stream. Under this first and necessary restriction, the right of the Commonwealth to make any erections in the river for the improvement of its use as a public highway, or to promote in any way the business and prosperity of the people, is undoubted and unlimited. Those who have shore or fishery rights took originally and still hold subject to this necessary transcendental power. Nor does the constitutional provision, that compensation shall be made to the owner of property taken for public use, apply to cases of mere consequential damages.² As the State, therefore, might itself have erected or caused to be erected the wharf and pier built by the defendants below, without any responsibility to the plaintiff for any consequential damages to his easement, or right of drawing his seine on the shore, so neither is the grantee or licensee of the State liable for such damage. As to him it is *damnum absque injuria*. His right of fishing, just as the right of the riparian owner himself to fish on his own land, was subject to the higher right of the Commonwealth for the public good, and if impaired or destroyed by the power of the sovereign, whether under general or special laws, he has no ground of action. It was an original implied condition of his grant if he or those under whom he claims ever had one, and his title by long use can rise no higher than its presumed source."

¹ Citing *Ball v. Slack*, 2 Whart. Coons, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts 508.

² *Monongahela Navigation Co. v. & S. 9.*

§ 174. In California the right to wharf out without license would appear to be conceded, though not directly decided.¹ Where, however, no question of riparian rights intervenes, the State may maintain ejectment for a wharf constructed without authority of law in navigable tide waters below low-water mark.² Land lying below high-water mark and within the ebb and flow of the tide cannot be purchased as swamp and overflowed land; and no right to obstruct navigation passes to the purchaser under the laws for the sale of such land.³ So lands within the flow of ordinary tides, the cost of reclaiming which would greatly exceed their value when reclaimed for any agricultural purpose, are not acquirable under a statute authorizing the sale of reclaimable lands.⁴

§ 175. In New York the general right to build, without authority from the legislature, wharves in tide waters, upon the soil owned by the State, appears not to have been affirmed judicially, and the tendency of the decisions is to limit the rights of littoral proprietors strictly. In this State the owner of land adjoining a navigable river has no right of property in the shore between high and low-water mark, and is not entitled to compensation when a railroad is constructed along the water front of his premises.⁵ The courts

¹ *Coburn v. Ames*, 52 Cal. 385; *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *People v. Broadway Wharf Co.*, Id. 33; *San Francisco v. Calderwood*, Id. 585; *Rondell v. Fay*, 32 Cal. 354; *Gunter v. Geary*, 1 Cal. 462; *Guy v. Hermance*, 5 Cal. 73; *Teschemacher v. Thompson*, 18 Cal. 11.

² *Ibid.*

³ *People v. Morrill*, 26 Cal. 336; *Taylor v. Underhill*, 40 Cal. 471. In *San Francisco v. Ellis*, 54 Cal. 72, a State statute authorizing the board of supervisors of the city and county of San Francisco to sell at public auction certain tide lands, the property of the State, except so much thereof as might be required for a

street and sewer, and providing that the deed of the mayor should vest the title in the purchasers, was held not to operate as a grant to the city and county.

⁴ *People v. Cowell*, 60 Cal. 400.

⁵ *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522; 12 Barb. 616; *Lansing v. Smith*, 8 Cowen, 146; 4 Wend. 9; *People v. Tibbetts*, 19 N. Y. 523, 528; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 245; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *People v. New York Ferry Co.*, 68 N. Y. 71, 78; 7 Hun, 105; *People v. Vanderbilt*, 26 N. Y. 287; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 41; *People v. Canal Apprais-*

of New York have no jurisdiction to restrain the erection of structures extending from the New Jersey shore into the Hudson River or the bay of New York, even though they constitute a common nuisance.¹ But the city and county of New York include the whole of the river and harbor adjacent to the city to actual low-water mark on the opposite shores, whether such water mark is formed by natural or artificial means.² The wharves and docks erected in Brooklyn, and extending beyond the natural low-water mark, are within the jurisdiction of that city;³ but the vessels which lie beyond, though fastened to such wharves or docks, are within the jurisdiction of New York.⁴ By acts of the legislature passed in 1848 and 1850, the owners of real estate fronting on the water in the city of Brooklyn were given the right to erect bulkheads and wharves in front of their respective lands as far as the permanent water line established by statute in 1836.⁵ The corporation of New York, under its ancient charters, which are confirmed by the Constitution of the State, owns in fee the land under the waters of the East and North rivers to the distance of four hundred feet beyond the line of low-water mark, as it existed at the date of the charters.⁶ It may construct piers and wharves at the public

ers, 33 N. Y. 461, 467; *People v. New York*, 8 Abb. Pr. 7, 12; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; 7 Rob. 523; *Hudson River Railroad Co. v. Loeb*, 7 Rob. 418; *Whetmore v. Atlantic White Lead Co.*, 37 Barb. 70, 96; *Getty v. Hudson River Railroad Co.*, 21 Barb. 617. In *Delaware Canal Co. v. Lawrence*, 2 Hun, 163; 53 N. Y. 612, the defendant had title, under patents from the State, to the soil under water on which the wharf was erected, and it was held that the only question was whether the wharf was a public nuisance because of interference with the navigation.

¹ *People v. Central Railroad Co.*, 42 N. Y. 283; 48 Barb. 478; *State v. Babcock*, 30 N. J. L. 29. See *The Argo*, 7 Ben. 304.

² *Udall v. Brooklyn*, 19 Johns. 175;

Stryker v. New York, 19 Johns. 179; *In re Furman Street*, 17 Wend. 649; *Orr v. Brooklyn*, 36 N. Y. 661; *Atlantic Dock Co. v. Brooklyn*, 3 Keyes, 444; 1 Abb. Dec. 24; *Livingston v. Ogden*, 4 Johns. Ch. 48; *Ex parte Vanderbilt*, *Ibid.* 57; *Luke v. Brooklyn*, 43 Barb. 54; *New York v. Hart*, 16 Hun, 389; *Furman v. New York*, 5 Sand. 16; *People v. Colgate*, 9 Hun, 708; 67 N. Y. 512.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70; *People v. Kelsey*, 38 Barb. 269; 14 Abb. Pr. 372; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384.

⁶ See cases in next note; also, *Towle v. Palmer*, 1 Rob. 437; 1 Abb. Pr. n. s. 81; *Towle v. Smith*, 2 Rob.

expense, and take the profits, when it owns the adjoining lots.¹ It may lease the public wharves so erected.² Since the charter of 1730, at least, the city has the right to convey this land, even below low-water mark, with the privilege of building wharves thereon, and receiving wharfage therefrom,³ subject to the power of the city to impose in the grant or by ordinance such conditions with respect to streets and wharves as are consistent with the laws of the State,⁴ and subject, also, to the control of the State in the establishment

489; *Towle v. Remsen*, 70 N. Y. 303; *Schermerhorn v. New York*, 3 Edw. Ch. 119; *Verplanck v. New York*, 2 Edw. Ch. 220; *New York v. Scott*, 1 Caines, 543; *Dickinson v. Codwise*, 1 Sand. Ch. 214; *Roosevelt v. Frost*, 1 Edw. Ch. 579; *Furman v. New York*, 10 N. Y. 567; 5 Sand. 16; *Nott v. Thayer*, 2 Bosw. 10; *Hecker v. New York Balance Dock Co.*, 24 Barb. 215, 217; *Vanderbilt v. New York*, 2 Sand. 258.

¹ *Ibid.*; *Marshall v. Guion*, 11 N. Y. 461 (overruling s. c. 4 Denio, 581, and *Marshall v. Vultee*, 1 E. D. Smith, 294); *Thompson v. New York*, 11 N. Y. 115; 3 Sand. 487; *Furman v. New York*, 10 N. Y. 567; *Beach v. New York*, 45 How. Pr. 357; *New York v. Whitney*, 7 Barb. 485; *New York v. Scott*, 1 Caines, 543; *Murray v. Sharp*, 1 Bosw. 539; *Mayor v. Whitney*, 7 Barb. 485; *Mayor v. Rice*, 4 E. D. Smith, 604. Under the charter of 1708, the city of New York acquired the vested right to maintain ferries and to take tolls therefrom forever between the city and Long Island. *Benson v. New York*, 10 Barb. 223; *People v. New York*, 32 Barb. 102; *Darlington v. New York*, 31 N. Y. 202.

² *Commissioners v. Clark*, 33 N. Y. 251; *Swords v. Edgar*, 59 N. Y. 28; *Clancy v. Byre*, 56 N. Y. 129; *Radway v. Briggs*, 37 N. Y. 256; *Hartford Steamboat Co. v. New York*, 78 N. Y. 1; *New York v. Price*, 5 Sand. 542; *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275; 9

Bosw. 369; 2 *Bosw.* 106; *New York v. Hill*, 13 How. Pr. 280; *Taylor v. Beebe*, 3 Rob. 262; *Farmers' Loan Co. v. New York*, 4 *Bosw.* 80. As to the powers of the commissioners of pilots, of the department of public docks and the harbor-masters of New York, and formerly of the dock-master, see *Commissioners v. Vanderbilt*, 31 N. Y. 265; 2 Rob. 367; *Commissioners v. Clark*, 33 N. Y. 251; *Commissioners v. Erie Railway Co.*, 41 N. Y. 619; 5 Rob. 366; *New York v. Tucker*, 1 Daly, 107; *Adams v. Farmer*, 1 E. D. Smith, 588; *New York v. Rice*, 4 E. D. Smith, 604; *New York v. Ryan*, 2 E. D. Smith, 368; *Hoelt v. Seaman*, 46 How. Pr. 24; 6 J. & Sp. 62; *Moore v. Commissioners*, 32 How. Pr. 184; *People v. Mallory*, 2 Sup. Ct. 76; 4 Id. 567; 46 How. Pr. 281; 2 Hun, 381; *Commissioners v. Frost*, 4 Daly, 353; *People v. Deming*, 1 Hilt. 271; 13 How. Pr. 441; *Langdon v. New York*, 6 Abb. N. C. 314; *Hecker v. New York Balance Dock Co.*, 24 Barb. 215; 13 How. Pr. 549.

³ *Van Zandt v. New York*, 8 *Bosw.* 375; *Commissioners v. Clark*, 33 N. Y. 251; *New York v. Hill*, 13 How. Pr. 280; *Coddington v. White*, 2 Duer, 390; *Murray v. New York*, 1 *Bosw.* 539; *Stevens v. Rhinelander*, 5 Rob. 285; *Borell v. New York*, 2 Sand. 560.

⁴ *Ross v. New York*, 3 Wend. 333; *Duryea v. New York*, 2 Hun, 293; 4 Sup. Ct. 512; *Vandewater v. New York*, 2 Sand. 258.

of harbor lines.¹ In *People v. Vanderbilt*, it was held that a pier or crib erected beyond the water line established by law, under a permission from the authorities of the city, is abateable as a purpresture, even though it produces no injury to public rights.²

§ 176. In Maryland, the right of extending improvements in the harbor of Baltimore was secured to the owners of the lands adjacent by the colonial act of 1745 and by a statute passed in 1784. The act of 1745 did not preclude the State from granting to a person other than the riparian owner the unoccupied soil of a navigable stream over which such proprietor might otherwise have been entitled, under this act, to make improvements.³ Without such authority a stranger could not improve in front of land belonging to another without the latter's consent.⁴ In 1862 the legislature enacted that the proprietor of land bounding on any navigable waters in the State should be entitled to the exclusive right of making improvements in the water in front of his lands. Under this statute no patent can be

¹ *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 38 Barb. 282; 25 How. Pr. 140; *People v. New York Ferry Co.*, 68 N. Y. 71; 7 Hun, 105; *Hart v. Albany*, 3 Paige, 559; *People v. Cunningham*, 1 Denio, 524; *Wetmore v. Brooklyn Gaslight Co.*, 42 N. Y. 384; *Walsh v. New York Dry Dock Co.*, 77 N. Y. 448.

² *Ibid.* Land under the waters of the Hudson River, either within or without the water-front, may be condemned for the uses of a railroad terminus. *In re New York Central Railroad Co.*, 77 N. Y. 248.

³ *Casey v. Ingloes*, 1 Gill, 430; *Wilson v. Ingloes*, 11 Gill & J. 351; 6 Gill, 121, 152; *Baltimore Railroad Co. v. Chase*, 43 Md. 23, 36. See, generally, *Giraud v. Hughes*, 1 Gill & J. 249; *Smith v. Yates*, 2 H. & McHen. 244; *Dugan v. Baltimore*, 5 Gill & J. 357; *Harrison v. Sterrett*, 4 H. & McHen. 540; *Baltimore v. White*, 2 Gill, 444;

Hammond v. Ingloes, 4 Md. 138; *Day v. Day*, 22 Md. 530; *Patterson v. Gels-ton*, 23 Md. 432; *The Wharf Case*, 3 Bland, 361; *Baltimore v. McKim*, *Ibid.* 453; *Browne v. Kennedy*, 5 H. & J. 195; *George's Creek Coal Co. v. Detmold*, 1 Md. 225; *Young v. Frost*, *Id.* 377; *Spindler v. Atkinson*, 3 Md. 422; *Hoye v. Swan*, 5 Md. 248; *Armstrong v. Risteau*, 5 Md. 256, 276; *Mitchell v. Mitchell*, 6 Md. 234; *Page v. Baltimore*, 34 Md. 558; *Williams v. Baker*, 41 Md. 523; *Hazchurst v. Baltimore*, 37 Md. 199, 214; *Baltimore v. St. Agnes Hospital*, 48 Md. 419; *Howard v. Moale*, 2 H. & J. 249; *Cockey v. Smith*, 3 H. & J. 20; *Delaware Railroad Co. v. Stump*, 8 G. & J. 479; *Peterkin v. Ingloes*, 4 Md. 175; *Day v. Day*, *Id.* 262; *Raab v. State*, 7 Md. 483.

⁴ *Ibid.*; *Baltimore v. St. Agnes Hospital*, 48 Md. 419.

issued for land covered by navigable waters in front of the property of a riparian proprietor, so as to interfere with its prospective enjoyment by him.¹

§ 177. In Florida the title of the State to the shores of tide waters is divested by statute in favor of the littoral owners, who have the right to extend wharves to the channel, leaving space for the requirements of commerce.² Similar rights are secured to the littoral proprietors by the statutes of Oregon, under which the right to build out a wharf is held to be severable from the ownership of the adjoining land.³ Where the grantor of land bounded by tide water reserved all privileges around the land, he was held to retain the right of wharfing.⁴

§ 178. In Virginia it was early provided by statute⁵ that the limits or bounds of lands lying on the Atlantic Ocean, the Chesapeake Bay, and the rivers and creeks thereof within the State, should extend over the shore, and that the owners of such lands should possess exclusive rights and privileges to and along the shore to ordinary low-water mark.⁶ By a later statute, any person owning land upon a

¹ *Chapman v. Hoskins*, 2 Md. Ch. 485; *Day v. Day*, 22 Md. 530; *Patterson v. Gelston*, 23 Md. 432; *Goodsell v. Lawson*, 42 Md. 348; *Garitee v. Baltimore*, 53 Md. 422; *ante*, § 175. A land-office patent conveys no title to tide lands. *Chapman v. Hoskins*, 2 Md. Ch. 485.

² *Geiger v. Filor*, 8 Fla. 325, 339; *Alden v. Pinney*, 12 Fla. 348. Where the title to submerged land from low-water mark to the channel of a river was given to riparian owners by statute, to benefit commerce, a conveyance by such an owner by metes and bounds, without reference to the river as a boundary, the owner retaining structures on the submerged land and the grantee understanding that he got no title thereto, conveys no title to such submerged land as an

"appurtenance." *Rivas v. Solary*, 18 Fla. 122.

³ *Parker v. Taylor*, 7 Oregon, 435, 445.

⁴ *Parker v. Rogers*, 8 Oregon, 183.

⁵ 1 Rev. Code of 1819, c. 87, p. 341; *French v. Bankhead*, 11 Gratt. 136, 159. In 1705, when Norfolk was made a town, it was enacted that those who built out into the water before their own lots in the town, for the better conveniency of landing and shipping off goods, should have the whole benefit of such buildings, and the land so built upon should be reckoned as part of their lots. 3 Hen. Stat. at L. p. 412, c. 42; *Hardy v. McCullough*, 23 Gratt. 251, 262.

⁶ See *Garrison v. Hall*, 75 Va. 150.

watercourse may erect a wharf, pier, or bulkhead in such watercourse, if the navigation is not obstructed thereby and the private rights of other persons are not injured.¹ Subject to these conditions, a wharf may, in this State, be extended beyond low-water mark.²

§ 179. Riparian owners upon navigable *fresh* rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms in aid of and not obstructing the navigation.³ This is a riparian right, being dependent upon title to the bank and not upon title to the river bed.⁴ Its exercise may be regulated or prohibited by the State; but so long as it is not prohibited, it is a private right derived from a passive or implied license by the public.⁵ As it does not depend upon title to the soil under water, it is equally valid in those States in which the river beds are held to be public property and in those in which they are held to belong to the riparian proprietors *usque ad filum aquae*.⁶ This right is a mere franchise, in those localities

¹ Code 1873, Sec. 59, c. 52; Norfolk City v. Cooke, 27 Gratt. 430; Alexandria Railway Co. v. Faunce, 31 Gratt. 761, 764; United States v. Bain, 3 Hughes, 593.

² Norfolk City v. Cooke, 27 Gratt. 430, 438.

³ Dutton v. Strong, 1 Black, 1, 23; Railroad Co. v. Schurmeir, 7 Wall, 272; 10 Minn. 82; Yates v. Milwaukee, 10 Wall. 497; Atlee v. Packet Co., 21 Wall. 389; 2 Dillon, 479; Leigh v. Holt, 5 Biss. 338; Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; Delaphine v. Chicago Railway Co., 42 Wis. 214; Boorman v. Sunnachs, Ibid. 233; Diedrich v. Northwestern Railway Co., Ibid. 248; Stevens Point Boom Co. v. Reilly, 46 Wis. 237; 44 Wis. 295; Cohn v. Wausau Boom Co., 47 Wis. 314, 322; Walker v. Shepardson, 4 Wis. 486; Grant v. Davenport, 18 Iowa, 179; Haight v. Keokuk, 4 Iowa, 199; Musser v. Hershey, 42 Iowa, 356; Ryan v. Brown, 18 Mich. 106; Austin v. Rut-

land Railroad Co., 45 Vt. 215; Sloan v. Biemiller, 34 Ohio St. 492, 513; Blanchard v. Porter, 11 Ohio, 138; Rippe v. Chicago Railroad Co., 23 Minn. 18; Brisbine v. St. Paul Railroad Co., Ibid. 114; Morrill v. St. Anthony Falls Co., 26 Minn. 222; Ensminger v. People, 47 Ill. 384; Chicago v. Laffin, 49 Ill. 172; Meyers v. St. Louis, 8 Mo. App. 266; Bainbridge v. Sherlock, 29 Ind. 364; Sherlock v. Bainbridge, 41 Ind. 35; Laughlin v. Lamasco City, 6 Ind. 223; Thurman v. Morrison, 14 B. Mon. 367; Morrison v. Thurman, 17 Ibid. 257; Norfolk City v. Cooke, 27 Gratt. 430, 434; Alexandria Railway Co. v. Faunce, 31 Gratt. 761, 764.

⁴ Ibid.; Cohn v. Wausau Boom Co., 47 Wis. 314, 322; Diedrich v. Northwestern Railway Co., 42 Wis. 248; Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 304; 46 Wis. 237.

⁵ Ibid.

⁶ Ibid.

where navigable fresh waters are public property ; and if land is made by a stranger by filling in earth in front of land bounding upon such waters, the riparian owner, while entitled to damages for any interference with his access to the water, cannot maintain ejectment for the land so made.¹ But the riparian owner may, as against the public, reclaim the marshy land lying in front of his estate, if he does not obstruct the navigation, and conforms to the regulations of the State.² He may, also, under the same restrictions, intrude upon the water as far as low-water mark, and erect embankments there for the purpose of protecting his land, when by natural causes the water is wearing away the banks.³ But if, without authority, he erects structures below low-water in navigable waters which belong to the State, he loses all title to the property so placed.⁴

§ 180. The exercise of this right to build out into navigable waters, wharves, piers, and docks, tends to aid navigation and commerce. The legislature may authorize the extension of such structures beyond low-water mark;⁵ but if not sanctioned by the legislature, they are illegal so far as they interfere with or limit the right of navigation.⁶ The public right of fishery, however, is subordinate to the right of navigation, and wharves and buildings upon flats which are consistent with the latter right will not be declared unlawful for want of legislative sanction because they exclude the public from taking shell-fish or floating fish in the space covered by the structure.⁷

§ 181. In determining the distance from the bank to which a wharf or other similar structure may thus be ex-

¹ *Austin v. Rutland Railroad Co.*, 45 Vt. 215; *Stockham v. Browning*, 18 N. J. Eq. 390; *Coburn v. Ames*, 52 Cal. 335. But see *Nichols v. Lewis*, 15 Conn. 137, 143.

² *Railroad Co. v. Schurmeir*, 7 Wall. 272; 10 Minn. 82; *Grant v. Davenport*, 18 Iowa, 179; *Musser v. Hershey*, 42 Iowa, 356; *ante*, § 161.

³ *Diedrich v. Northwestern Rail-*

way Co., 42 Wis. 248; *Larson v. Furlong*, 50 Wis. 681, 691.

⁴ *Ibid.*; *Gray v. Bartlett*, 20 Pick. 186.

⁵ *Ante*, § 140.

⁶ *Ante*, § 134.

⁷ *Moulton v. Libbey*, 37 Maine, 472; *Clement v. Burns*, 43 N. H. 609; *ante*, §§ 87, 169.

tended, the rule, as generally stated, is that these structures must not pass the point of navigability.¹ This rule is somewhat indefinite, and, as wharves, piers, booms, and the like, are valuable aids to navigation and commerce, the limits would be so narrow as to make these structures practically useless, if the point of navigability is fixed at the line beyond which a boat, raft, or log could not float. In the case of encroachments upon tide waters, the question of nuisance or not nuisance is one of fact.² With respect to encroachments, the correct rule seems to be indicated in the following remarks of Ryan, C. J.:³ "A pier upon Lake Michigan, to aid navigation, must go into water deep enough to be accessible to vessels navigating the lake. A boom on a logging stream, to aid such navigation, must go into water deep enough to be accessible to floating logs; must be so constructed as to receive and discharge floating logs. In either case, to reach navigable water reasonably implies reaching it with effect to accomplish the purpose; the word often signifying some penetration of the thing reached. One is not understood to stop outside the limits of a place when he is said to reach it. He is understood to enter it, as far as may be necessary for his purpose. The right in question necessarily implies some intrusion into navigable water, at peril of obstructing navigation. This intrusion is expressly permitted to aid navigation, and expressly prohibited to obstruct navigation. It is impossible to give a general rule limiting its extent. That will always depend upon the conditions under which the right is exercised; the extent and uses of the navigable water; the nature and object of the structure itself. A structure in aid of navigation, which would be a reasonable intrusion into the waters of Lake Michigan, would probably

¹ *Dutton v. Strong*, 1 Black, 1, 23; *Atlee v. Packet Co.*, 2 Dillon, 479, 485; 21 Wall. 389; *Diedrich v. Northwestern Railway Co.*, 42 Wis. 248; *Rippe v. Chicago Railroad Co.*, 23 Minn. 18; *Brisbine v. St. Paul Railroad Co.*, *Ibid.* 114, 130.

² *Ante*, § 93.

³ *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237, 244; 44 Wis. 295; *Atlee v. Packet Co.*, 21 Wall. 389, 393; *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322. See, also, *Buszard v. Capel*, 4 Bing. 137, 140; 12 Moore, 339; *The Wharf Case*, 3 Bland. Ch. 361, 369.

be an obstruction of navigation in any navigable river within the State. A logging boom which would be a reasonable intrusion into the waters of the Mississippi, would probably be an obstruction of navigation in most or all the logging streams within the State. The width of a river may justify a liberal exercise of the right of intrusion, or may exclude it altogether. Its extent is purely a relative question." It was accordingly held in this case that the erection of booms extending through shoal water only so far as was necessary to reach the navigable part of the river was not within the prohibition of a statute forbidding the obstruction of navigable rivers without authority from the legislature.

§ 182. Riparian proprietors upon fresh-water streams have the exclusive right of fishing in the water opposite their lands, and this right extends to navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property.¹ Riparian proprietors upon all such streams, whose title extends *ad filum aquae*, can maintain an action of trespass against those who draw a seine between the centre of the stream and the bank of his land.² This exclusive right exists, also, in the case of private lakes and ponds.³ In those States in which the soil of navigable fresh streams or lakes is held to be public property, the right of fishing in them is a common right, as in the case of tide waters.⁴

¹ Hale, *De Jure Maris*, c. 1, § 5; *Hargrave's Law Tracts*, 2, 56; 3 *Kent Com.* 409, 417; *Royal Fishery of the Banne*, Davies, 149; *Freary v. Cooke*, 14 *Mass.* 488; *Commonwealth v. Chapin*, 5 *Pick.* 199; *Vinton v. Welsh*, 9 *Pick.* 87; *Waters v. Lilley*, 4 *Pick.* 145; *Commonwealth v. Alger*, 7 *Cush.* 53, 97; *McFarlin v. Essex Co.*, 10 *Cush.* 304; *Commissioners v. Holyoke Water Power Co.*, 104 *Mass.* 446; *Commonwealth v. Vincent*, 103 *Mass.* 441; *People v. Platt*, 17 *Johns.* 195; *Hooker v. Cummings*, 20 *Johns.* 90; *Trustees v. Strong*, 60 *N. Y.* 56; *Gould v. James*, 5 *Cowen*, 369; *Adams v. Pease*, 2

Conn. 481; *Smith v. Miller*, 5 *Mason*, 191; *Cobb v. Davenport*, 32 *N. J. L.* 369; *Browne v. Kennedy*, 5 *H. & J.* 195; *Beckman v. Kraemer*, 43 *Ill.* 447; *Lewis v. Keeling*, 1 *Jones (N. C.)* 299; *Ingram v. Threadgill*, 3 *Dev.* 59.

² *Adams v. Pease*, 2 *Conn.* 483; *ante*, § 100.

³ *Ibid.*; *Woolrych on Waters*, 93; *Cobb v. Davenport*, 32 *N. J. L.* 369; 33 *N. J. L.* 223; *ante*, §§ 79-85.

⁴ *Carson v. Blazer*, 2 *Binney*, 475; *Shrunk v. Schuylkill Navigation Co.*, 14 *S. & R.* 71; *Hart v. Hill*, 1 *Whart.* 124; *Tinicum Fishing Co. v. Carter*,

§ 183. The authorities refer to four kinds of fishery: First, a several fishery, where he who hath the exclusive right of fishery is presumably the owner of the soil;¹ second, a free fishery, which is an exclusive franchise existing by grant or prescription in public navigable waters in the hands of a subject who hath a property in the fish, and may bring a possessory action for them without making any title to the soil;² third, a common of fishery, which resembles the case of other common, and is a right or liberty of taking fish in common with certain others in waters flowing through another man's land;³ fourth, a common fishery, which may be for all mankind, as in the sea, and not merely in common with certain other persons in a particular stream.⁴ Much confusion exists, however, respecting the distinctions between

61 Penn. St. 21; *West Roxbury v. Stoddard*, 7 Allen, 158; *State v. Franklin Falls Co.*, 49 N. H. 240; *Sloan v. Biemiller*, 34 Ohio St. 492; *Cates v. Wadlington*, 1 McCord, 580; *Collins v. Benbury*, 5 Ired. 118; 3 Id. 277; *Wilson v. Forbes*, 2 Dev. 30; *Ingram v. Treadgill*, 3 Dev. 59; *State v. Glen*, 7 Jones, 321; *Boatwright v. Bookman*, Rice (N. C.) 447.

¹ *Pollexfen v. Crispin*, 1 Vent. 122; *Smith v. Kemp*, 2 Salk. 637; *Holt*, 322; *Somerset v. Fogwell*, 5 B. & C. 875; *Co. Litt.* 122a; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732, 744, 747; *Anon.*, Loft. 364; *Partheriche v. Mason*, 2 Chitty, 658; *Holford v. Bailey*, 13 Q. B. 425, 444; 8 Q. B. 1000; *Rex v. Old Arlesford*, 1 T. R. 358; *Seymour v. Courtenay*, 5 Burr. 2814; *Alderman v. Hastings*, 2 Sid. 8; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Miller v. Little*, L. R. 2 Ir. 304; *Northumberland v. Houghton*, L. R. 5 Ex. 127; *Queen v. Steer*, 3 Salk. 291; *Malcomson v. O'Dea*, 10 H. L. Cas. 618; *Moulton v. Libbey*, 37 Maine, 489; *Preble v. Brown*, 47 Maine, 284; *Caswell v. Johnson*, 58 Maine, 164; *Freary v. Cooke*, 14 Mass. 488; *Stoughton v. Baker*, 4 Mass. 522; *Melvin v. Whiting*, 5 Pick. 70; 10

Pick. 295; 13 Pick. 184; *McFarlin v. Essex Co.*, 10 Cush. 304; *Chalker v. Dickinson*, 1 Conn. 510; *Munson v. Baldwin*, 7 Conn. 168; *Trustees v. Strong*, 60 N. Y. 56; *Skinner v. Hettrick*, 73 N. C. 53. A several fishery does not merge upon its being resumed by the crown. *Northumberland v. Houghton*, L. R. 5 Ex. 127. User for forty-five years of certain engines for catching salmon, without evidence of previous user, does not raise a conclusive presumption of law that the engines had been used from time immemorial, and were not of recent origin. *Holford v. George*, L. R. 3 Q. B. 639. The presumption is against the existence of a several fishery in tide waters, and the burden of proof is upon him who claims the exclusive right. *Fitzwalter's Case*, 1 Mod. 105; *Crichton v. Coltery*, Ir. R. 4 C. L. 508.

² *Smith v. Kemp*, 2 Salk. 637; 2 Black. Com. 34; 3 Kent Com. 409; *Upton v. Dawkin*, 3 Mod. 97; *Child v. Greenhill*, Cro. Car. 553; *Alderman v. Hasting*, 2 Sid. 8; 1 Swift's Dig. 110.

³ *Smith v. Kemp*, 2 Salk. 637.

⁴ *Benett v. Costar*, 8 Taunt. 183; 2 Moore, 33; *Lord Fitzwalter's Case*, 1 Mod. 105.

these classes. By the apparent weight of authority a several fishery may exist independently of the ownership of the soil beneath the water,¹ and it has been held² that a free fishery is not an exclusive right, but the same as a common of fishery. "The more easy and intelligible arrangement of the subject," says Kent, "would seem to be, to divide the right of fishing into a right common to all, and a right vested exclusively in one or a few individuals."³

§ 184. A right of fishery in another's stream is not a mere easement, or right of user without derogation of the property, but is a *profit à prendre*, a taking or diminution *pro tanto* of the property itself. A custom thus to take anything from another's land is not a lawful custom, and, if available at all,

¹ Marshall v. Ulleswater Steam Navigation Co., 3 B. & S. 732, 747; Reg. v. Ellis, 1 M. & S. 652; Holford v. Bailey, 8 Q. B. 1000; 13 Q. B. 427; Somerset v. Fogwell, 5 B. & C. 875; Co. Litt. 4b, 122a; 1 Inst. 46, 56; 2 Black. Com. 39; Royal Fishery of the Banne, Davies, 149; Partheriche v. Mason, 2 Chitty, 658; Bridges v. High-ton, 11 L. T. N. S. 653; Cobb v. Davenport, 32 N. J. L. 369; 33 N. J. L. 223; Yard v. Carman, Penn. (N. J.) 936; Rogers v. Jones, 1 Wend. 237; Collins v. Benbury, 3 Ired. 283; 5 Ired. 118; Skinner v. Hettrick, 73 N. C. 53; Hale, De Jure Maris, pp. 18, 19; Woolrych on Waters, 88, 91; Paterson's Fishery Laws, 65; Chitty on Fisheries, 295. The devise of a "fishing place" passes no interest in the soil, but merely an easement for the purpose of the fishery. Hart v. Hill, 1 Whart. 124; Lakeman v. Butler, 17 Pick. 436.

² Melvin v. Whiting, 7 Pick. 79; 13 Pick. 184; 1 Inst. 122; Woolrych on Waters, 92; Schultes on Aquatic Rights, 67; Carter v. Murcot, 4 Burr. 2162; Seymour v. Courtenay, 5 Burr. 2816; Gibbs v. Woolicot, Holt, 323; 3 Salk. 290, 360; Kinnersley v. Orpe, Dougl. 56; Rex v. Ellis, 1 M. & S.

652; Johnson v. Bloomfield, 1 R. 8 C. L. 68.

³ 3 Kent Com. 411. Woolrych (on Waters, 87), says: "A right of any kind means, in strict legal language, a profit or easement which is enjoyed in the soil of another; and thus, when we speak of a right of fishery, we mean the liberty of fishing in the water of another; and it has been so defined. 4 Com. Dig. 365. When, therefore, we discover that the soil over which the stream runs, and the water itself, belong to the same person, we do not say correctly, that such an individual has a right of fishery, because the land and its profits are so completely identified as his inheritance that they cannot be separated. If any description be applied to it, it should be that of territorial fishery (Schultes, 87), because the party has the dominion over the territory or land itself. And hence it follows, that those who maintain the opinion that the owner of a several fishery must necessarily have the soil as incident to the enjoyment, will consider this territorial possession as the several fishery so frequently mentioned in our books."

must be set up by prescription as belonging to some estate, and is to be pleaded with a *que* estate.¹ "Where," says Huddleson, B.,² "a river is navigable and tidal, the public have a right to fish; but where it is navigable and not tidal, not only have the public no right, but they can have no right to fish." The owner of a privilege of fishery is not disseised thereof by the annual temporary use of the privilege by another.³

§ 185. A fishery may be leased,⁴ and is so far real estate that it is subject to dower.⁵ Trespass lies for the disturbance of an exclusive right of fishing attached to the soil,⁶ and apparently an action of ejectment may be maintained for a fishery,⁷ but it has been held that the action of forcible entry

¹ Gatewood's Case, 6 Co. 60; Grimstead v. Marlow, 4 T. R. 718; Bland v. Lipscombe, 4 E. & B. 714, n.; Lloyd v. Jones, 6 C. B. 81; Race v. Ward, Id. 702; 7 Id. 384; Hudson v. McRae, 4 B. & S. 585; Hargreaves v. Diddams, L. R. 10 Q. B. 582; Mills v. Colchester, L. R. 2 C. P. 476; Mussett v. Burch, 35 L. T. n. s. 486; Murphy v. Ryan, Ir. R. 2 C. L. 143; Wickham v. Walker, 7 M. & W. 63; Waters v. Lilley, 4 Pick. 145; McFarlin v. Essex Co., 10 Cush. 304; Codman v. Evans, 5 Allen, 308, 310; Cobb v. Davenport, 32 N. J. L. 369; 33 N. J. L. 223; Tinicum Fishing Co. v. Carter, 61 Penn. St. 21. See Saltash v. Goodman, 42 L. T. n. s. 872; Johnson v. Barnes, 27 Id. 152; Warrick v. Queen's College, 25 Id. 254; Northumberland v. Houghton, 22 Id. 491; Chiltern v. London, 38 Id. 498; Abbott of Strada Marcella's Case, 9 Co. Rep. 24 a; Bryant v. Foot, L. R. 2 Q. B. 161; Willingale v. Maitland, L. R. 3 Eq. 103.

² Pearce v. Scotcher, 46 L. J. n. s. 342; 9 Q. B. D. 162.

³ Nickerson v. Brackett, 10 Mass. 217; McFarlin v. Essex Co., 10 Cush. 304.

⁴ Holford v. Pritchard, 3 Exch. 793; Rex v. Old Alresford, 1 T. R. 358;

Cooper v. Phibbs, L. R. 2 H. L. 149; State v. Sutton, 2 R. I. 434; State v. Cozzens, 2 R. I. 561; New England Oyster Co. v. McGarvey, 12 R. I. 385; Watertown v. White, 13 Mass. 477; Eastham v. Anderson, 119 Mass. 526. In the last case it was held that a person who has taken a parol lease of a fishery from a town is liable for the stipulated rent, if he has enjoyed the premises, notwithstanding the statute of frauds.

⁵ Russell v. Russell, 15 Gray, 159; Bacon's Abr. Dower; Park on Dower, 252. In Greyes' Case, Owen, 20, it was held that fish in a pond pass to the heir and not to the executor.

⁶ Child v. Greenhill, Cro. Car. 553; Smith v. Kemp, 2 Salk. 637; Holford v. Bailey, 13 Q. B. 426; Russell v. Stocking, 8 Conn. 236; Cobb v. Davenport, 32 N. J. L. 369, 384; 33 N. J. L. 223; Hart v. Hill, 1 Whart. 124; Collins v. Benbury, 5 Ired. 118; Adams v. Pease, 2 Conn. 483; Woolrych on Waters, 92. Overflowing or drawing out of a fishery is a trespass. Courtney v. Collet, 1 Ld. Raym. 272.

⁷ Molineaux v. Molineaux, Cro. Jac. 146; Rex v. Old Alresford, 1 T. R. 358, 361; Waddy v. Newton, 8 Mod. 276; Woolrych on Waters, 92.

and detainer will not lie.¹ An injunction may be granted, on the ground of irreparable injury, to restrain such pollution of fresh waters² or such unlawful exclusion of tide waters³ as tends to destroy a private right of fishing.

§ 186. The privilege of fishing must be so used as not to injure others. As the right of navigation in public waters is of a higher character than a fishery, the latter cannot be exercised in derogation of commerce.⁴ So the nets or traps which may be lawfully used in a private fishery must be such as will not injure the rights of other persons.⁵ "Upon most occasions," says Woolrych, "a man may use any nets, according to his pleasure in his several fishery which he appropriates exclusively to himself,⁶ but if he allow another to participate in his property, he cannot be justified in taking the fish with such engines as would leave none for his grantee; because the principle is *sic utere tuo ut alienum non laedas*. Then, with respect to a common of fishery, the user of nets must be regulated according to the custom of the manor. In some manors, the net is employed at certain seasons for the purpose of taking fish; and it would be clearly incompetent for some commoners to drag with instruments of a greater depth than customary, whilst their neighbors were content with the usual manner of obtaining the commonable profit. With respect to the quantity of fish which may be taken, it is clear, that in a several fishery, that is, where the proprietor has an exclusive right, the number must be unrestricted. So it is, where the same person is owner of the fishery and also of the soil, exclusively of any other. And so, again, the owner of a several or territorial fishery may take an unrestrained

¹ Van Auken v. Decker, Pen. (N. J.) 108, 110.

² Aldred's Case, 9 Rep. 59 a; Attorney General v. Birmingham, 4 K. & J. 528; Oldaker v. Hunt, 31 Eng. L. & Eq. 503; Seaman v. Lee, 10 Hun, 607.

³ Bridges v. Highton, 11 L. T. N. S. 653; Stannard v. Hubbard, 34 Conn. 370; Britton v. Hill, 27 N. J. Eq. 389.

⁴ Ante, § 87; Anon. 1 Camp. 517, n.

⁵ Warren v. Mathews, 1 Salk. 357; 6 Mod. 73; Commonwealth v. Ruggles, 10 Mass. 319; Commonwealth v. Chapin, 5 Pick. 199; Boatwright v. Bookman, Rice (S. C.) 447, 451; Jackson v. Lewis, Cheves (S. C.) 259; Pitkin v. Olmstead, 1 Root, 217.

⁶ Ibid. See State v. Skolfield, 63 Maine, 260.

profit, although another have a co-extensive right with himself. But the lord of a manor, it should seem, may not use the water where his tenants have a common of piscary, to so large an extent as to deprive them of their privilege, because such an act would be in derogation of his own original grant. And as a general principle, the proprietor of a fishery cannot so use it as to injure a similar right belonging to another person."

§ 187. In *Weld v. Hornby*,¹ it was held that the enlarging of an ancient weir, so as to stop the passage of fish up a river to the plaintiff's fishery, was an actionable injury. And in the Irish case of *Hamilton v. Donegall*,² the proprietor of a several fishery in the upper part of a river was permitted to maintain an action against the owner of a fishery in the lower part of the same river for maintaining structures which prevented fish from coming to his fishery. In *Leconfield v. Lonsdale*,³ it was held that the provisions of Magna Charta and other early English statutes, making weirs public nuisances, applied only to navigable rivers, but that the preventing of fish from arriving at a fishery on a stream not navigable was a grievance which gave a right of action, independent of any question of public nuisance. The maintenance of dams without fish-ways in an unnavigable stream, which is the outlet of a public lake, whereby the passage of migratory fish from the sea to the lake is prevented, is held, in New Hampshire, to be an indictable offence at common law,⁴ and the right to maintain such structures cannot be acquired by prescription.⁵ In Massachusetts, the right to have migratory fish pass up the rivers and streams to their

¹ 7 East, 195; 3 Smith, 244; 2 Roll. Abr. 142.

² 3 Ridgeway, 267; Woolrych on Waters, 189.

³ L. R. 5 C. P. 657; *Rolle v. Whyte*, L. R. 3 Q. B. 286; *Callis on Sewers*, 258; *Vin. Abr. Nuisance*, 3; *Hale, De Jure Maris*, c. 3, 5; 2 Inst. 38; *Case of Chester Mill*, 10 Co. Rep. 138. A remedy by statute, which provides a

penalty against those who obstruct the passage of fish, is merely cumulative, and does not prevent an action on the case by the owner of a fishery. *Barden v. Crocker*, 10 Pick. 383.

⁴ *State v. Franklin Falls Co.*, 49 N. H. 240.

⁵ *Ibid.*; *Cottrill v. Myrick*, 12 Maine, 222.

headwaters is a public right, and the riparian proprietors hold their right to fish subject to the control of the legislature; but the subject has been so long regulated by legislation that the only remedy for obstructing the passage of fish is held to be that provided by statute.¹ The rule is the same in Maine² and New York.³ A statutory provision, that passage-ways for fish shall be made in all dams upon a river, is not necessarily repealed by a subsequent statute authorizing dams without qualification.⁴ In *Woolever v. Stewart*,⁵ in Ohio, a statute requiring the owner of a dam constructed across an unnavigable stream, which had been maintained adversely for twenty-one years, to construct and maintain at his own expense a chute or passage-way for fish over the same, was held to be unconstitutional, but the question was left open whether the act was valid where the adverse use is for a less period than twenty-one years.

¹ *Stoughton v. Baker*, 4 Mass. 522; *Randolph v. Braintree*, 4 Mass. 315; *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. McCurdy*, 5 Mass. 324; *Commonwealth v. Ruggles*, 10 Mass. 391; *Waters v. Lilley*, 4 Pick. 145; *Watertown v. Draper*, 4 Pick. 166; *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 87; *Nickerson v. Brackett*, 10 Pick. 212; *Barden v. Crocker*, 10 Pick. 383; *Atwood v. Caswell*, 19 Pick. 493; *Hyde v. Russell*, 2 Cush. 251; *McFarlin v. Essex Co.*, 10 Cush. 309, 310; *Commonwealth v. Essex Co.*, 13 Gray, 230; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 450; *Commonwealth v. Vincent*, 108 Mass. 446; *Commonwealth v. Tiffany*, 119 Mass. 300; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500.

² *Cottrill v. Myrick*, 12 Maine, 222; *Fuller v. Spear*, 14 Maine, 417; *Lunt v. Hunter*, 16 Maine, 9; *Baker v. Wentworth*, 17 Maine, 347; *Peables v. Hannaford*, 18 Maine, 106; *Parker v. Cutler Milldam Co.*, 20 Maine, 353;

Moulton v. Libbey, 37 Maine, 472; *State v. Skolfield*, 63 Maine, 266; *Yarmouth v. Skillings*, 45 Maine, 133; *Penobscot Co. v. Treat*, 16 Maine, 378; *Hancock Co. v. Eastern Co.*, 16 Maine, 303; 20 Maine, 72. See *Bristol v. Ousatonie Water Co.*, 42 Conn. 403.

³ *Shaw v. Crawford*, 10 Johns. 236; *People v. Platt*, 17 Johns. 195; *Hooker v. Cummings*, 20 Johns. 90, 96; *People v. Canal Appraisers*, 33 N. Y. 461; *People v. Reed*, 47 Barb. 235. See in other States, *Hayden v. Noyes*, 5 Conn. 397; *Hart v. Hill*, 1 Whart. 132; *Criswell v. Clugh*, 3 Watts, 330; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Budd v. Sip*, 13 N. J. L. 348; *Eubank v. Pence*, 5 Litt. (Ky.) 338. In New Jersey and Vermont, the legislature may provide for the protection of fish in unnavigable waters. *Weller v. Snover*, 42 N. J. L. 341; *Haney v. Compton*, 36 N. J. L. 507.

⁴ *Vinton v. Welsh*, 9 Pick. 87.

⁵ 36 Ohio St. 146.

§ 188. By the common law, a town has no right of property in the fisheries within its limits;¹ but the Crown or the State may grant to a town the right of fishery within its borders.² By the local law of Massachusetts, a town may appropriate the fish in contiguous tide waters, if not appropriated by the legislature,³ and, in both Massachusetts and Maine, towns have immemorially regulated the right of fishing, for the common benefit, even in unnavigable streams.⁴ One who has purchased from a town a privilege of fishing may maintain an action at common law against those who obstruct the passage of the fish, although it is provided by a statute, which prohibits such obstruction, that a certain penalty may be recovered by any one therefor in a *qui tam* action.⁵ In Connecticut, towns may regulate the taking of shell-fish; but a town by-law, prohibiting all persons, except inhabitants of the town, from taking shell-fish in a navigable river in the town, is void, being against common right.⁶ In other States, it is held that, if the legislature has not regulated private rights of fishery, a riparian owner upon an unnavigable stream cannot, under the pretext of regulation, be

¹ *Randolph v. Braintree*, 4 Mass. 315; *Coolidge v. Williams*, 4 Mass. 140.

² *Brookhaven v. Strong*, 60 N. Y. 56; *Robins v. Ackerly*, 24 Hun, 449; *Paul v. Hazleton*, 37 N. J. L. 106; *Wooley v. Campbell*, Id. 163.

³ *Commonwealth v. Chapin*, 5 Pick. 199; *Dill v. Wareham*, 7 Met. 438, 446.

⁴ *Ibid.*; *Nickerson v. Brackett*, 10 Mass. 212; *Briggs v. Murdock*, 13 Pick. 305; *Vinton v. Welsh*, 9 Pick. 87; *Waters v. Lilly*, 4 Pick. 145; *Allen v. Marion*, 11 Allen, 108; *Eastham v. Anderson*, 119 Mass. 526; *Watertown v. White*, 13 Mass. 477; *Taunton v. Caswell*, 4 Pick. 275; *Weston v. Sampson*, 8 Cush. 347; *Proctor v. Wells*, 103 Mass. 216; *Robinson v. Wareham*, 2 Gray, 315; *Cottrill v. Myrick*, 12 Maine, 222; *Peables v. Hannaford*, 18 Maine, 106; *Fossett*

v. Bearce, 27 Maine, 117; 34 Maine, 575; *Spear v. Robinson*, 29 Maine, 531.

⁵ *Barden v. Crocker*, 10 Pick. 383; *Commonwealth v. Chapin*, 5 Pick. 199. If two or more take fish unlawfully, judgment and satisfaction in debt *qui tam* against one is a bar to a like action against the others. *Boutelle v. Nourse*, 4 Mass. 431.

⁶ *Hayden v. Noyes*, 5 Conn. 391. In *Rowe v. Smith*, 48 Ct. 444, 447, *Pardee, J.*, said: "At the revolution the title to the shores of the sea passed from the corporate freeman of the colony to the people of the State, and in them remains the proprietorship of fisheries, shell and floating, in its navigable waters. Towns have no ownership in or control over them. The legislature alone can create an individual proprietorship in them."

required without compensation to remove a dam which obstructs the passage of fish.¹

§ 189. The legislature of a State has power to regulate the time and manner of taking floating or shell-fish in the public navigable waters within its limits,² or to exclude the citizens of other States from the enjoyment of this privilege,³ and may doubtless grant exclusive rights of fishing at particular places in them.⁴ In those waters, at least, which, whether fresh or salt, are not navigable from the sea for any useful purpose, there is no restriction upon the authority of a State to regulate the public rights of fishing, or to make any grants of exclusive rights which do not impair private rights already vested.⁵ Laws for the regulation of fishing are public statutes, of which the courts take judicial notice.⁶

¹ *Woolever v. Stewart*, 36 Ohio St. 146; *State v. Glen*, 7 Jones (N. C.) 321; *Cornelius v. Glen*, Id. 512; *Bristol v. Water Co.*, 42 Conn. 403; *Boatwright v. Bookman*, Rice (S. C.) 447.

² *Commonwealth v. Vincent*, 108 Mass. 447; *Commonwealth v. Bailey*, 13 Allen, 541; *Burnham v. Webster*, 5 Mass. 266; *Nickerson v. Brackett*, 10 Mass. 212; *Boutelle v. Nourse*, 4 Mass. 431; *Moulton v. Libbey*, 37 Maine, 472; *Parker v. Cutler Mill-dam Co.*, 20 Maine, 353; *Lowndes v. Dickenson*, 34 Barb. 586; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Kean v. Rice*, 12 S. & R. 203; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Skinner v. Hettrick*, 73 N. C. 53; *Hettrick v. Page*, 82 N. C. 65; *Gentile v. State*, 29 Ind. 409; *State v. Boone*, 30 Ind. 225; *Stuttsman v. State*, 57 Ind. 119; *State v. Norton*, 45 Vt. 258; *State v. Hockett*, Id. 302; *Budd v. Sip*, 16 N. J. L. 348; *Shoemaker v. State*, *Spencer* (N. J.) 153; *Yard v. Carman*, Pen. (N. J.) 943; *Howell v. Robb*, 3 Hal. Ch. 17; *Eastham v. Anderson*, 119 Mass. 526.

³ *Ibid.*; *McCready v. Virginia*, 94 U. S. 391; *Smith v. Maryland*, 18 How. 71; *Corfield v. Coryell*, 4 Wash. 371;

Bennett v. Boggs, Bald. 60; *Martin v. Waddell*, 16 Peters, 367, 410, 423; *Dunham v. Lamphere*, 3 Gray, 268; *ante*, § 38; *Moulton v. Libbey*, 37 Maine, 472; *Haney v. Compton*, 36 N. J. L. 507.

⁴ *Ibid.*; *Commonwealth v. Vincent*, 108 Mass. 447; *Burnham v. Webster*, 5 Mass. 266; *Hallock v. Dominy*, 7 Hun, 52; 69 N. Y. 238; *Paul v. Hazleton*, 37 N. J. L. 106, 107; *Woolley v. Campbell*, Id. 163; *Gough v. Bell*, 21 N. J. L. 157; *Bell v. Gough*, 22 N. J. L. 441; *Stevens v. Paterson Railroad Co.*, 34 N. J. L. 532; *Power v. Tazewells*, 25 Gratt. 786; *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255; *Gallup v. Tracy*, 25 Conn. 10.

⁵ *Commonwealth v. Vincent*, 108 Mass. 447; *Commonwealth v. Weatherhead*, 110 Mass. 175; *Nickerson v. Brackett*, 10 Mass. 212; *Cleveland v. Norton*, 6 Cush. 380; *Russell v. Russell*, 15 Gray, 159; *Commonwealth v. Tiffany*, 119 Mass. 300.

⁶ *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. McCurdy*, Id. 324. Such laws, though applicable only to the water and not to the land, are not repugnant to a constitutional provision that no general law shall

A statute is constitutional which provides that waste materials injurious to fish shall not be cast into streams,¹ and the legislature may prohibit, with penalties, the taking of fish with nets or seines, or in the spawning season.² An individual may plant oysters in navigable waters, and retain such exclusive property therein, if in a clearly defined bed, as to entitle him to maintain a bill for an injunction³ or an action of trespass for their asportation,⁴ and an indictment lies against those who steal oysters so planted.⁵ Private persons may, it seems, acquire exclusive rights of fishery in navigable waters by prescription as well as by grant from the State,⁶

embrace any provision of a private, special, or local character. *Doughty v. Conover*, 42 N. J. L. 193.

¹ *Blydenburgh v. Miles*, 39 Conn. 484, 497; *Oberich v. Gilman*, 31 Wis. 495.

² *Commonwealth v. Look*, 108 Mass. 452; *Smith v. Look*, 108 Mass. 139; *Commonwealth v. Vincent*, 108 Mass. 441; *Watertown v. Draper*, 4 Pick. 165; *Hyde v. Russell*, 2 Cush. 251; *Atwood v. Caswell*, 19 Pick. 493; *Cleaveland v. Norton*, 6 Cush. 381; *Locke v. Motley*, 2 Gray, 265; *Hanscomb v. Russell*, 15 Gray, 162, 166; *Hathaway v. Thomas*, 16 Gray, 290.

³ *Britton v. Hill*, 27 N. J. Eq. 389.

⁴ *Colchester v. Brooke*, 7 Q. B. 339; *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 586; *Brinckerhoff v. Starkins*, 11 Barb. 248; *Shepard v. Levenson*, 1 Penn. (N. J.) 391; *State v. Taylor*, 27 N. J. L. 117; *Haney v. Compton*, 36 N. J. L. 507; *Britton v. Hill*, 27 N. J. Eq. 389; *Arnold v. Mundy*, 1 Hal. 1; *Power v. Tazewells*, 25 Gratt. 786; *Phipps v. State*, 22 Md. 380; *McKenzie v. Hulet*, N. C. Term Rep. 181. See, as to the construction of statutes relating to oyster fisheries, *Bigler v. Morgan*, 77 N. Y. 312; *State v. Mister*, 5 Md. 11; *Willing v. Bozman*, 52 Md. 44; *Gallup v. Tracy*, 25 Conn. 10; *Averill v. Hull*, 37 Conn. 320.

⁵ *State v. Taylor*, 27 N. J. L. 117.

⁶ *Oxford v. Richardson*, 4 T. R. 437; *Carter v. Murcot*, 4 Burr. 2164; *Ward v. Creswell*, Willes, 265; *Fitzwalter's Case*, 1 Mod. 105; *Anon.*, 6 Mod. 73; *Warren v. Mathews*, 1 Salk. 357; *Scrutton v. Brown*, 4 B. & C. 485; *Royal Fishery of the Banne*, Davies, 149; *Lowe v. Govett*, 3 B. & Ad. 863; *King v. Montague*, 4 B. & C. 598; *Somerset v. Fogwell*, 5 B. & C. 884; *Blundell v. Catterall*, 5 B. & Ald. 268; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Carlisle v. Graham*, L. R. 4 Ex. 361; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Rogers v. Allen*, 1 Camp. 309; *Allen v. Donnelly*, 5 Ir. C. L. 132; *O'Neill v. Allen*, 9 Ir. C. L. 132; *Whitstable Free Fishers v. Gann*, 19 C. B. n. s. 803, 810; *Devonshire v. Hodnett*, 1 Hud. & Br. (Ir.) 322; *Hayes v. Bridges*, 1 Ridg. L. & S. 390; *Brew v. Haren*, Ir. R. 11 C. L. 199; *Richardson v. Gray*, 3 App. Cas. 1; *Hale, De Jure Maris*, c. 5, 6; *Saltash v. Goodman*, 5 C. P. D. 431; *Northumberland v. Houghton*, L. R. 5 Ex. 127. *Contra* in Pennsylvania, *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21. See *Rogers v. Jones*, 1 Wend. 237; *Jacobson v. Fountain*, 2 Johns. 170; *Gould v. James*, 6 Cowen, 369; *Palmer v. Hicks*, 6 Johns. 138; *Brookhaven v. Strong*, 60 N. Y. 56; *Bennett v. Boggs*, Bald. 60; *Lay v. King*, 5 Day, 72; *Peck v. Lockwood*, 5 Day, 22; *Chalk-*

although at common law a grant of such right from the Crown without the assent of Parliament is invalid, if made within the time of memory, or, indeed, according to numerous authorities, if made since Magna Charta.¹ In *Rogers v. Allen*,² which was an action of trespass for breaking and entering the plaintiff's several fishery in the river Burnham by dredging for oysters, the question was as to the extent of a prescriptive right of fishery as appurtenant to a manor, the evidence being that the public had been accustomed to fish in the river for floating fish only. The fishery was held to be divisible, Heath, J., saying: "Part of a fishery may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property."

§ 190. In *Fleet v. Hegeman*,³ an action of trespass was brought for taking away a quantity of oysters which the plaintiff had gathered two years before, when they were small, and planted in tide water, about fifteen rods from the shore, in a space enclosed by stakes. In reversing a judgment for the defendant in the lower court, the Supreme

er v. Dickinson, 1 Conn. 382; *Church v. Meeker*, 34 Conn. 421; *State v. Sutton*, 2 R. I. 434; *State v. Medbury*, 3 R. I. 138; *Yard v. Carman*, 3 N. J. L. 936; *Paul v. Hazleton*, 37 N. J. L. 106; *Wooley v. Campbell*, 37 N. J. L. 163; *Browne v. Kennedy*, 5 H. & J. 203; *Day v. Day*, 4 Md. 262; *Delaware Railroad Co. v. Stump*, 8 Gill & J. 479; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Parker v. Cutler Milldam Co.*, 20 Maine, 253; *Moulton v. Libbey*, 37 Maine, 472; *Prebles v. Brown*, 47 Maine, 284; *Clement v. Burns*, 43 N. H. 621; *Weston v. Sampson*, 8 Cush. 347; 2 Dane Abr. 690; *Commonwealth v. Bailey*, 13 Allen, 543; *Lake-man v. Burnham*, 7 Gray, 440; *Proctor v. Wells*, 103 Mass. 216; *Commonwealth v. Vincent*, 108 Mass. 446;

Hittinger v. Eames, 121 Mass. 539, 546; *Paine v. Woods*, 108 Mass. 169; *Gough v. Bell*, 21 N. J. L. 156; *Delaware Canal Co. v. Raritan Railroad Co.*, 16 N. J. Eq. 321, 366; *Collins v. Benbury*, 3 Ired. 277; 5 Ired. 118; *State v. Glen*, 7 Jones, 321; *Jackson v. Lewis, Cheves (S. C.)* 259, 262; *Woolrych on Waters*, 80.

¹ *Ibid.*

² 1 Camp. 309, 313.

³ 14 Wend. 42. In an action of trespass for taking oysters from the plaintiff's oyster-bed, the defendant cannot, under the general issue, show that the *locus in quo* is a public river from which the public have a right to take oysters. *Shreves v. Liveson*, 1 Penn. 247.

Court said: "That a qualified property in the oysters was acquired by the plaintiff is admitted. But it is contended that the planting them in the bay where a common right of taking them existed was an abandonment of them to the public use. If so, it must be by force of law, for the case fully discloses that no such intent in point of fact existed. On the contrary, they were deposited there by the owner to improve, or rather give value to them, and with reference to an ulterior use. As to all inanimate things, an absolute property in possession may be acquired in them,—such as goods, plate, money; and if the article in question could be considered as falling within that description, there could be no doubt the defense taken would be untenable, unless there was an abandonment in fact. Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them, no good reason is perceived why it should not be governed by the rules of law applicable to inanimate things. But it is contended they fall within the rules of law applicable to animals denominated *ferae naturae*, the same as deer in the forest, pigeons in the air, or fish in public waters or the ocean. A qualified property is acquired in these by reclaiming and taming them, or by so confining them within the immediate power of the owner as to prevent their escape and the use of their natural liberty. The right of the plaintiff to the oysters is within the reason of these principles. They have been reclaimed, and are as entirely within his possession and control as his swans or other water fowl that may float habitually in the bay. They were distinctly designated according to usage; and, besides, the defendants had actual information of the ownership, and they can set up no greater right to take them because found in their native element than tame pigeons in the air or a domesticated deer upon the mountain. If the bed interfered with the exercise of the common right of fishery, or if the oysters were undistinguished among others belonging to the public waters, the interest of the owners in them would undoubtedly be subservient to the enjoyment of the public use. But the

exercise of that right in this case was a mere pretense. No oysters of the natural growth of the bay, fit for use, had been found there for years. The bed interfered with no other sort of fishing for either profit or pleasure. The case presents a deliberate and wanton violation of property acquired by the industry and care of another, under the pretext of exercising a right in common which the defendants knew to be fruitless. We certainly would have regretted if the law had given countenance to such depredations, and we are rejoiced to find they are as gross a violation of law as they are of the first principles of justice."

§ 191. The privilege of gathering ice upon waters which are public property is a common right. It is so held with respect to great ponds in Massachusetts.¹ The remedy for an unreasonable or excessive use of the liberty of cutting ice on the great ponds of this State is by indictment;² and although the owner or lessee of an ice-house and land upon the shore of such a pond has the same right as others to cut and take ice which is the natural product of the pond, he cannot, to the exclusion of other public uses, occupy any part of the pond for the purpose of increasing the thickness of the ice by artificial means, or maintain an action against those who come upon the pond lawfully and there cut holes in the ice in the exercise of the public right of fishery.³ So, the owners of lands bordering upon navigable streams, in those States where they are held to be public property, have no title to the ice which forms on such streams, as incident to their ownership of the banks, but the ice belongs to the first appropriator.⁴ An appropriation of the ice upon these streams is made by surveying, marking, and staking off the

¹ *Hittinger v. Eames*, 121 Mass. 530; *Anc. Chart.* 148; *Cummings v. Barrett*, 10 Cush. 186; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Commonwealth v. Vincent*, 108 Mass. 441; *Fay v. Salem Aqueduct*, 111 Mass. 27; *Gage v. Steinkrauss*, 131 Mass. 222;

Tudor v. Cambridge Water Works, 1 Allen, 161.

² *West Roxbury v. Stoddard*, 7 Allen, 158.

³ *Hittinger v. Eames*, 121 Mass. 530; *Rowell v. Doyle*, 131 Mass. 474.

⁴ *Wood v. Fowler*, 26 Kansas, 682; *Hickey v. Hazard*, 3 Mo. App. 480.

ice, if unappropriated by others, and expending money to preserve it, and by these acts a sufficient possession is acquired to support an action of trespass.¹ Ice forming on a navigable fresh-water stream, the bed of which belongs to the riparian proprietors, is their property, and a person who appropriates it for his own gain cannot justify the trespass on the ground that its removal was advantageous to the public easement of navigation.² The fact that the business of harvesting ice is an important industry does not justify the erection of a dam, without the authority of the legislature, across an arm of the sea which is of small importance for navigation, for the purpose of excluding the salt water and creating a fresh-water pond for the formation of ice, and the right to maintain such a dam cannot be acquired by prescription.³

Ice forming upon private fresh-water streams and ponds belongs exclusively to the riparian proprietors, who may prevent its removal by others or maintain trespass against those who cut it without license.⁴ The owner of an artificial mill-pond, who is entitled to the water of the pond, is also entitled, as against the riparian owners, to have the ice which forms thereon remain, if its removal will appreciably diminish the head of water at his dam;⁵ and a grant of the right to flow land by damming a stream has been held to give to the grantee the exclusive right to gather the ice which forms on the pond so made.⁶ In Massachusetts, the owner of a mill-dam, by proceedings under the mill act, acquires merely a right to raise the water by his dam, and

¹ Ibid.

² *Washington Ice Co. v. Shortall*, 101 Ill. 46.

³ *Dyer v. Curtis*, 72 Maine, 181.

⁴ *Mill River Manuf. Co. v. Smith*, 34 Conn. 462; *Edgerton v. Huff*, 26 Ind. 35; *State v. Pottmeyer*, 30 Ind. 287; 33 Ind. 402; *Dates v. State*, 31 Ind. 72; *Lorman v. Benson*, 8 Mich. 18. When riparian estates are taken by right of eminent domain, the value of ice privileges connected therewith may form an element of the damages.

Ham v. Salem, 100 Mass. 350; *Paine v. Woods*, 108 Mass. 173.

⁵ *Mill River Woollen Manuf. Co. v. Smith*, 34 Conn. 462; *Seeley v. Brush*, 35 Conn. 419; *Cummings v. Barrett*, 10 Cush. 186; *Paine v. Woods*, 108 Mass. 160, 173; *Myer v. Whitaker*, 55 How. Pr. 376; *Marshall v. Peters*, 12 How. Pr. 218.

⁶ *Myer v. Whitaker*, 5 Abb. N. C. 172. The case was criticized in a later decision in *New York*. *Dodge v. Berry*, 25 Alb. L. Journ. 303.

the owner of land thereby flowed may remove the water when formed into ice, for use or sale, provided he does not lessen the water-power.¹ When the State appropriates the fee of land for the construction of canals, the former owner has no right to take ice therefrom;² but if the canal is simply a servitude, the owner of the fee is entitled to take the ice when its removal does not interfere with the navigation or the use of the water for hydraulic purposes.³ In Indiana and Illinois, ice forming upon private waters is held to be real estate.⁴ In Michigan it is held that, as the ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, it is unlike crops or emblements, and that any sale of ice actually formed is a sale of personalty.⁵ The measure of damages for a wrongful taking of ice from another's waters, like that of an unauthorized taking of coal from another's mine, is the value of the ice when converted into a chattel and ready for removal and sale.⁶ If wantonly destroyed while in the process of formation, the value of the ice that would probably have been saved for market, less the expense of storing it, is the measure of damages.⁷

§ 192. By the common law, as stated by Lord Mansfield, and approved by Chancellor Kent,⁸ vessels or goods cast

¹ *Cummings v. Barrett*, 10 Cush. 134, 144; *Proctor v. Adams*, 113 Mass. 186; *Paine v. Woods*, 108 Mass. 173.

² *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364; *Cromie v. Board of Trustees*, 71 Ind. 208. See *Card v. McCaleb*, 69 Ill. 314.

³ *Edgerton v. Huff*, 26 Ind. 35.

⁴ *State v. Pottmeyer*, 33 Ind. 402; 30 Ind. 287; *Washington Ice Co. v. Shortall*, 101 Ill. 46.

⁵ *Higgins v. Kustener*, 41 Mich. 318.

⁶ *Washington Ice Co. v. Shortall*, 101 Ill. 46; 25 Alb. L. Journ. 106.

⁷ *People's Ice Co. v. The Excelsior*, 44 Mich. 229.

⁸ *Hamilton v. Davis*, 2 Burr. 2732; 2 Kent Com. 322, 359; 3 Dane Abr.

134, 144; *Proctor v. Adams*, 113 Mass. 376; *Wonson v. Sayward*, 13 Pick. 402; *The Augusta*, 1 Hagg. Adm. 16, 18, 20; *Rex v. Property Derelict*, 1 Hagg. Adm. 383; *Rex v. 49 Casks of Brandy*, 3 Hagg. Adm. 270; *Rex v. Two Casks of Tallow*, 3 Hagg. Adm. 294; *The Pauline*, 2 Rob. Adm. 358; *Bracton*, fol. 120, § 5; *Woodward v. Fox*, 2 Vent. 188; *Sir Henry Constable's Case*, 5 Co. 108; *Talbot v. Lewis*, 6 C. & P. 606; *Dickens v. Shaw*, reported in Hall on the Seashore, App. 45; *Alcock v. Cooke*, 2 M. & P. 625; *Stackpoole v. Queen*, Ir. R. 9 Eq. 119; *Clark v. Chamberlain*, 2 M. & W. 78; *Legge v. Boyd*, 1 C.B. 92; *Palmer v. Rouse*, 3 H. & N. 505; 1 Black. Com.

ashore by the sea, and technically known as wreck, became the property of the Crown after the lapse of a year and a day; and during that period they were placed in the custody of the admiralty for the benefit of the owners, who might reclaim them, though no living creature escaped from the shipwrecked vessel. The owner of land on which wreck is cast is under no duty to preserve it for the owner.¹ He has no right to it against the owner, but has a title to it, if not reclaimed, sufficient to entitle him to an action against strangers who enter upon his land and take away the wreck.² If the property is in danger of being swept away by the sea, any person may enter upon the land without license for the purpose of saving it;³ and if there is a right to take wreck, there is a right by virtue of necessity to enter on land for that purpose.⁴ The original owner has also the right to enter on the land upon which his property is cast for the purpose of removing it, and if prevented from so doing he may maintain an action of trover for the conversion of his property.⁵

In the case of waifs and drift-wood floating down private streams, the riparian proprietors have an exclusive right to such property, when carried upon their lands, against all but the true owner; but they have no title to it until reduced to possession, and if others seize it before it reaches their land they cannot complain.⁶ As against the owner, such pro-

291; 2 Id. 14; 3 Id. 106; 4 Id. 235; Hale, *De Jure Maris*, c. 7.

¹ *Sutton v. Buck*, 2 Taunt. 302, 312; *Proctor v. Adams*, 113 Mass. 377; *Forster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Woodward v. Carl*, 3 Luz. L. Reg. (Penn.) 227.

² *Dunwich v. Sterry*, 1 B. & Ad. 831; *Barker v. Bates*, 13 Pick. 255; *Proctor v. Adams*, 113 Mass. 376. Goods found derelict at sea, and brought into port, are not the property of the finders, who are, however, entitled to salvage. *Whitwell v. Wells*, 24 Pick. 30; *Ellery v. Cunningham*, 1 Met. 112.

³ *Proctor v. Adams*, 113 Mass. 377; 21 Hen. VII. 27, 28, pl. 5; Bro. Abr.

Trespass, 213; Vin. Abr. *Trespass*, H. a. 4, pl. 24; K. a. pl. 3; *Hetfield v. Baum*, 13 Ired. 394, 399.

⁴ *Anon.*, 6 Mod. 149; *Hetfield v. Baum*, 13 Ired. 394.

⁵ *Ibid.*; *Foster v. Juniata Bridge Co.*, 16 Penn. St. 393; *Etter v. Edwards*, 4 Watts, 63.

⁶ *Barrett v. Bangor*, 70 Maine, 335. In *Rogers v. Judd*, 5 Vt. 223, a riparian owner was held to have no property in timber floating over his land, but to have an exclusive right to convert to his own use such timber moving in an eddy over his land, unless reclaimed by the owner in a reasonable time.

prietors are entitled to just compensation, in the nature of salvage, for the labor and expense of saving the property;¹ and, if they see fit to remove it from their premises, they are bound to do so with as little injury as possible.² If the former owner elects to reclaim his property, he may do so upon payment of such damages as it may have caused to the riparian proprietor, and the necessary expenses of keeping and repairing it; but if he chooses to abandon it, he is not liable for such damages and expenses.³ The lessee of a farm adjoining a river is entitled to drift-wood which he takes therefrom as against his lessor, unless otherwise provided in the lease.⁴ Where one riparian proprietor planted a row of trees along the line between his land and that of an adjoining proprietor who brought suit against him for thus causing drift-wood to be lodged upon his land during freshets, it was held that no action would lie for such obstruction.⁵

§ 193. The privilege of maintaining a ferry has been named among riparian rights.⁶ But the right to maintain a ferry, which, in its very nature, implies the taking of tolls,⁷ is a franchise, and a fixed toll cannot be demanded for the transportation of passengers or merchandise by this means without the consent of the legislature.⁸ It is not essential

¹ *Tome v. Dubois*, 6 Wall. 548; *Winslow v. Walker*, 1 Hay (N. C.) 193. See *Tome v. Four Cribs of Lumber*, Taney, 533; *Gentry v. Madden*, 3 Ark. 127. As to rights under statutes for saving waifs, see *State v. Adams*, 16 Maine, 67; *Flanders v. Locke*, 53 Cal. 21; *Wilson v. Wentworth*, 25 N. H. 245; *Scott v. Willston*, 3 N. H. 321; *Ethelridge v. Jones*, 8 Ired. 100; *Collard v. Eddy*, 17 Mo. 354.

² *Berry v. Carle*, 3 Maine, 269.

³ *Sheldon v. Sherman*, 42 N. Y. 484; *Chase v. Corcoran*, 106 Mass. 286.

⁴ *Dyer v. Haley*, 29 Maine, 277.

⁵ *Taylor v. Fickas*, 64 Ind. 167.

⁶ *Bowman v. Wathen*, 2 McLean, 376; *Bell v. Gough*, 23 N. J. L. 624, 676.

⁷ *Gray, C. J.*, in *Attorney General*

v. Boston, 123 Mass. 460, 468, citing *Hale de Jure Maris*, c. 2; *Hargrave's Law Tracts*, 6; *Woolrych on Ways*, 217; *North and South Shields Ferry v. Barker*, 2 Exch. 136, 149; 2 *Dane Abr.* 683, 684; *Fay*, petitioner, 15 *Pick.* 243, 249, 250; *Newburgh Turnpike v. Miller*, 5 Johns. Ch. 101, 112; *Aiken v. Western Railroad*, 20 N. Y. 370, 379, 386.

⁸ *Ante*, § 142; 1 *Black. Com.* 37, 38; *Mills v. St. Clair Co.*, 8 *How.* 581; *Conway v. Taylor*, 1 *Black.* 603; *Milk v. Commissioners*, 3 *Scam.* 53; *Trustees v. Tatman*, 13 *Ill.* 27; *Hudson v. Cuero Land Co.*, 47 *Texas*, 58; *Williams v. Davidson*, 43 *Texas*, 1; *Nashville Bridge Co. v. Shelby*, 19 *Yerger*, 280; *McRoberts v. Washburne*, 10 *Minn.* 23.

to the validity of the franchise that the owner of the ferry should have the property in the soil on either side of the river.¹ Preference is frequently given by statute, in granting this privilege, to the owners of the banks of waters across which the ferry is to be maintained, upon their making application and complying with the prescribed statutory conditions.² But the legislature may repeal at pleasure the statute giving this preference.³ When a ferry franchise is granted to one who is not a riparian proprietor, compensation must be provided if the public good requires the taking of the land upon the banks for the purposes of the ferry, as for landings.⁴ A ferry franchise may, however, be acquired by prescription,⁵ and so, it would seem, may the right to use the river banks as a landing.⁶

¹ *Peter v. Kendal*, 6 B. & C. 703; *Newton v. Cubitt*, 12 C. B. N. S. 32; *Gant v. Drew*, 1 Oregon, 35; *Mills v. Learn*, 2 Id. 215.

² *Mullis v. Cavins*, 5 Blackf. 77; *Gant v. Drew*, 1 Oregon, 35; *Mills v. Learn*, 2 Id. 215; *Knott v. Frush*, Id. 237; *Beckley v. Learn*, 3 Oregon, 544, 470; *Dunlap v. Yoakum*, 18 Texas, 582; *Haynes v. Wells*, 26 Ark. 464; *Lindsay v. Lindley*, 20 Ark. 573; *Willard v. Forsythe*, 2 Mich. N. P. 190.

³ *Hudson v. Cuero Land Co.*, 47 Texas, 58; *Bass v. Fontleroy*, 11 Texas, 698.

⁴ *Ibid.*; *Peter v. Kendal*, 6 B. & C. 703; *Doty v. Gorham*, 5 Pick. 487; *Prosser v. Wapello County*, 18 Iowa, 327; *Averett v. Brady*, 20 Ga. 523; *New York v. New York Ferry Co.*, 40 N. Y. Sup. Ct. 232, 245.

⁵ *Supervisors v. McFadden*, 57 Miss. 618; *Williams v. Turner*, 7 Ga. 348; *Laredo v. Martin*, 52 Texas, 548; *Bowman v. Wathen*, 2 McLean, 376. The limits of the ferry, when ascertained and fixed by user or otherwise, are confined to one line of travel. *Newton v. Cubitt*, 12 C. B. N. S. 32; 13 Id. 864; *Yard v. Ford*, 2 Wms. Sand. 174, n. (a); *Price v. Knott*, 8 Oregon, 438. See next note.

⁶ *Bird v. Smith*, 8 Watts, 434; *ante*, § 105. The owner of an ancient ferry, or of one that is authorized by the legislature, may maintain an action on the case for a nuisance, or a bill in equity for an injunction, against one who, without public authority, sets up a ferry near by, and injures his business. *Letton v. Goodden*, L. R. 2 Eq. 123; 3 Black. Com. 219; *Vin. Abr. Nuisance*, G.; *Huzzey v. Field*, 2 C. M. & R. 432; *East Hartford v. Hartford Bridge Co.*, 10 How. 541; *Stark v. McGowen*, 1 Nott & McCord, 387; *Long v. Beard*, 3 Murph. (N. C.) 57; 2 Id. 337; *Taylor v. Wilmington Railroad Co.*, 4 Jones (N. C.) 277; *Smith v. Harkins*, 3 Ired. Eq. 613; *Long v. Merrill*, N. C. Term. R. 112. But the owner of a public ferry cannot maintain an action against those who use their own boats merely for their own passage, or the transportation of their own property, or that of their customers without charging a fee. *Trent v. Cartersville Bridge Co.*, 11 Leigh, 521; *Greer v. Haugabrook*, 47 Ga. 282; *Hanson v. Webb*, 3 Cal. 237; *Californian Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 423; *Enfield Toll Bridge Co. v. Hartford Railroad Co.*, 17 Conn. 64. If a

§ 194. A stream of water is a safe boundary of real estate;¹ and when called for as a boundary in the description of a deed, will control courses, distances, the designated quantity,² or the corners, monuments, and meander lines of

statute, conferring an exclusive right of ferry, provides a penalty for its violation, no action lies at common law for a disturbance of the right, but the remedy is by an action for the penalty. *Almy v. Harris*, 5 Johns. 175. The keeper of a public ferry is a common carrier, and is as much bound to furnish a safe landing as to furnish a safe vessel. *Walker v. Jackson*, 11 M. & W. 161; *Willoughby v. Horridge*, 12 C. B. 742, 749; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; *White v. Winnisimmet Co.*, 7 Cush. 155; *Wyckoff v. Queen's County Ferry Co.*, 52 N. Y. 32; *Clark v. Union Ferry Co.*, 35 N. Y. 485; *Hazman v. Hoboken Land Co.*, 50 N. Y. 53; *Fisher v. Clisbee*, 12 Ill. 344; *Harvey v. Rose*, 26 Ark. 3; *Whitmore v. Bowman*, 4 G. Greene, 148; *Dudley v. Camden Railroad Co.*, 42 N. J. L. 25; *Blakeley v. Le Duc*, 19 Minn. 187; *Wilson v. Sulkin*, 6 Jones (N. C.) 375; *Babcock v. Herbert*, 3 Ala. 392; *McLean v. Burbank*, 11 Minn. 277; *Wilson v. Hamilton*, 4 Ohio St. 722; *Richards v. Fuqua*, 28 Miss. 792; *Powell v. Mills*, 37 Miss. 691; *May v. Hanson*, 5 Cal. 360; *Johnson v. Erskine*, 9 Texas, 1; *Albright v. Penn*, 14 Texas, 290. But a mill-owner who keeps a ferry merely for his own use and the convenience of his customers, and who charges no ferriage, is only bound to ordinary diligence. *Self v. Dunn*, 42 Ga. 528. A ferry franchise may be sold, transferred, or inherited; *Lewis v. Gainesville*, 7 Ala. 85; *Greer v. Haugabrook*, 47 Ga. 282. See *The Maverick*, 1 Sprague, 23. But it cannot everywhere be acquired by prescription. *Bird v. Smith*, 8 Watts, 434; *Sullivan v. Supervisors*, 58 Miss. 790. *Contra*, *Davis v. Police Jury*, 19 La. 533. Being an incorporeal hereditament, it

can only be transferred by deed. *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508. It may be appurtenant to land, or in gross. In the former case, a conveyance of the land "with the appurtenances" passes the ferry. *Reg. v. Great Northern Railway Co.*, 14 Q. B. 25; *State v. Willis*, Busb. (N. C.) 223; *Biggs v. Ferrall*, 12 Ired. 1; *Haithcock v. Swift Island Manuf. Co.*, 72 N. C. 410. In the latter case it does not. *Haithcock v. Swift Island Manuf. Co.*, 72 N. C. 410. The ferry franchise may be lost by non-user. *Greer v. Haugabrook*, 47 Ga. 282; *Smith v. Harkins*, 3 Ired. Eq. 613; *Jeffersonville v. The John Shallcross*, 35 Ind. 19; *Brerly v. Norris*, 23 Ark. 514. A ferry is not a "street" or "public road." *Cooper v. Athens*, 53 Ga. 638; *Supervisors v. McFadden*, 57 Miss. 618. But may be "land" within the meaning of a statute. *Queen v. Cambrian Railway Co.*, L. R. 6 Q. B. 422; L. R. 4 Q. B. 320.

¹ *Robeson v. Hornbaker*, 2 Green Ch. 60, 64; *Hartshorn v. Wright*, 1 Peters, C. C. 64; *Beahan v. Stapleton*, 13 Gray, 427; *Davis v. Rainsford*, 17 Mass. 207.

² *Ibid.*; *Newsom v. Pryor*, 7 Wheat. 7; *Preston v. Bowman*, 6 Wheat. 582; *Jackson v. Camp*, 1 Cowen, 605; *Graves v. Fisher*, 5 Maine, 69; *Bowman v. Farmer*, 8 N. H. 402; *Martin v. Carlin*, 19 Wis. 454; *Davis v. Du Pont*, 30 Wis. 170; *Slade v. Neal*, 2 Dev. & Bat. 61; *President v. Clark*, 9 Ired. 58; *Campbell v. Branch*, 4 Jones, 313; *Bishop v. Morgan*, 82 Ill. 352; *Haughton v. Roscoe*, 3 Hawks, 21; *Harramond v. McLaughan*, *Taylor* (N. C.) 196; *Spring v. Hewston*, 52 Cal. 442; *Lewis v. Lewis*, 4 Oregon, 177.

a survey.¹ A survey which is described as running on the bank of a navigable river, is to be so run that none of the lines shall cross the river, and courses and distances crossing the river will be disregarded so far as they are interfered with by the river.² The side lines of land which is bounded by a river are to be continued to the stream in a straight line, if not otherwise defined in the deed,³ and the specified length of such lines is to be disregarded.⁴ When a deed, or survey and patent, shows a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract,⁵ and all the riparian rights incident to the ownership of the shore or bank pass to the grantee, unless clearly reserved.⁶ In case of ambiguity, parol evidence is admissible to determine the identical boundary referred to in a conveyance. If, for example, land upon a creek is conveyed and bounded "down the east bank of said creek to the ford below the mill," it would be for the jury to say, if there were two or more banks on the east side of the creek, which was intended as the boundary; but if the vendor has at the time, upon his other land opposite, a mill privilege which is not intended to be conveyed or relinquished, the

¹ *Shelton v. Maupin*, 16 Mo. 124; *Doe v. Hildreth*, 2 Ind. 274, 284; *Singleton v. Whiteside*, 5 Yerger, 18; *Meigs*, 207; *Overton v. Cannon*, 2 Humph. 264; *Simmons v. Baker*, *Cooke (Tenn.)* 146; *Verplank v. Hall*, 27 Mich. 79; *Galveston Co. v. Tankersley*, 39 Texas, 651.

² *Phillips v. Ayres*, 45 Texas, 601.

³ *Howard v. Moale*, 2 H. & Johns. 249; *Buckley v. Gilmore*, 12 Ohio, 63; *Hastings v. Stevenson*, 2 Ohio, 8; *Patterson v. Trask*, 30 Maine, 28; *Klingensmith v. Ground*, 5 Watts, 458; *Swisher v. Grumbles*, 18 Texas, 164.

⁴ *Graves v. Fisher*, 5 Maine, 69; *Pollock v. Harris*, 1 Hay. (N. C.) 252; *Carraway v. Witherington*, N. C. Term. Rep. 275. Where a grant called for a certain number of poles, "to a stake,

crossing the river," it was held that the line must cross the river, though the distance terminated before reaching it. *Whiteside v. Singleton*, *Meigs (Tenn.)* 207.

⁵ *County of St. Clair v. Lovington*, 23 Wall. 46, 63; *Churchill v. Grundy*, 5 Dana, 100; *Trustees v. Wagon*, 1 A. K. Marsh. 243; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Reid v. Langford*, 3 Id. 420; *Walker v. Orr*, *Hughes (Ky.)* 38; *Smith v. Evans*, Id. 160; *Bradford v. McClelland*, Id. 195; *Cockrell v. McQuinn*, 4 Mon. 62; *Bruce v. Morgan*, 1 B. Mon. 26; *French v. Bankhead*, 11 Gratt. 136, 157; *Brown v. Huger*, 21 How. 305; *Posey v. James*, 7 Lea (Tenn.) 98.

⁶ *Ibid.*; *Richardson v. Prentiss*, 48 Mich. 83.

court may decide, as matter of law, that the top of the bank above the ford, and not the low-water line, is the boundary, the intervening space being more appropriate for the use of the mill.¹ A plan referred to in the conveyance becomes a part thereof, and has the same effect as if its details of courses, distances, and monuments were incorporated in the instrument.² Where the shore and a plan referred to in a deed were incompatible, the plan was considered the more certain and controlled.³ But if a grant calls for a natural boundary, like a lake, which is not laid down upon a plat annexed thereto, the plat does not control the calls of the grant.⁴ A description which is so uncertain that it cannot be identified is void. If a boundary line is described in a deed as running from a creek which is several thousand feet in length, without other designation of the starting-point, and the description will be satisfied if the line starts from any point on the creek, the deed is indefinite and inoperative.⁵ When a tract of land extends along a river, the exterior lines are to be run so that every point in them shall be at the given distance from the nearest point on the stream,⁶ unless particular courses are given for the exterior lines.⁷ A con-

¹ *Jenkins v. Cooper*, 50 Ala. 419.

² *Lincoln v. Wilder*, 29 Maine, 169; *Erskine v. Moulton*, 66 Maine, 276; *Wellington v. Murdock*, 41 Maine, 231; *Whitman v. Boston & Maine Railroad*, 3 Allen, 133; *McIver v. Walker*, 4 Wheat. 444; 9 Cranch, 173; *Blaney v. Rice*, 20 Pick. 62; *Magoun v. Lapham*, 21 Pick. 135; *Shufeldt v. Spaulding*, 37 Wis. 662; *Loring v. Norton*, 8 Maine, 61; *Proprietors v. Tiffany*, 1 Maine, 210; *Eaton v. Knapp*, 29 Maine, 20; *Walker v. Boynton*, 120 Maine, 349; *Lunt v. Holland*, 14 Mass. 149; *Davis v. Rainsford*, 17 Mass. 207; *Boston Water Power Co. v. Boston*, 127 Mass. 376.

³ *Lincoln v. Wilder*, 29 Maine, 169.

⁴ *President v. Clark*, 9 Ired. 58; *Jamison v. Cornell*, 3 Hun, 557; 5 N. Y. Sup. Ct. 628.

⁵ *Le Franc v. Richmond*, 5 Sawyer,

601; *Fuller v. Williams*, Busb. Eq. 102; *Horton v. Cook*, 1 Jones Eq. 270; *McDiarmid v. McMillan*, 5 Jones Eq. 29; *Hinchey v. Nichols*, 72 N. C. 63; *Speed v. Wilson*, Sneed (Ky.) 73; *Donnebaum v. Tinsley*, 54 Texas, 362; *Shipp v. Miller*, 2 Wheat. 316; *Swanton v. Crooker*, 52 Maine, 415; *Martin v. Boon*, 2 Ohio, 238; *Miles v. Knott*, 12 Gill & J. 442. Greater certainty in describing the land is required in a legal process, like a petition for partition, than would suffice in a conveyance. *Miller v. Miller*, 16 Pick. 215.

⁶ *Winthrop v. Curtis*, 3 Maine, 110; *Dunn v. Hayes*, 21 Maine, 76; *Jackson v. Lunt*, 2 Caines, 363; *Van Gordon v. Jackson*, 5 Johns. 440; *Williams v. Jackson*, Id. 489; *Jackson v. Joy*, 9 Johns. 102.

⁷ *Keith v. Reynolds*, 3 Maine, 393; *Donaldson v. Lucett*, 2 Caines, 363;

tract for land "lying on both sides of Cold River," to be paid for at the rate of one hundred dollars per acre, does not bind the purchaser to pay for the river bed, although that passes by the deed.¹ In *Holbert v. Edens*,² in Tennessee, it was held that the purchaser, at a stipulated price per acre, of land which is bounded by the meanders of a river is only required to pay for the land bounded by a line running with the ordinary low-water mark, and any islands which may be between that line and the thread of the stream, and not for the river bed. Where land, described as grass land bounded by a drain, and containing about twenty-three acres, "but to be surveyed," was purchased at a specified price per acre, and measured about twenty-one acres to the edge of the drain, and about twenty-three acres to its centre, the purchaser was required to pay the stipulated price for the land to the middle of the stream.³

§ 195. When riparian estates are conveyed, the owner may reserve the land under water, but the general presumption, in all cases, is that the purchaser's title extends as far as the grantor owns.⁴ The legal effect of the conveyance is determined by the terms employed, and cannot be controlled by parol testimony,⁵ unless there is a latent ambiguity, or the description itself is rejected as false,⁶ or the identical boundary referred to in the conveyance is in dispute.⁷ If land is bounded by Broad River, it may be

Nicholl v. Huntington, 1 Johns. Ch. 166.

¹ *Daniels v. Cheshire Railroad Co.*, 20 N. H. 85.

² 5 Lea, 204.

³ *Re Popple*, 25 W. R. 248. See *Higginbotham v. Stoddard*, 72 N. Y. 94; *Ardery v. Rowles*, 71 Penn. St. 369; *Shand v. Triplett*, 5 Rich. Eq. (S. C.) 76.

⁴ *Boston v. Richardson*, 13 Allen, 155; *Ingraham v. Wilkinson*, 4 Pick. 268; *Pratt v. Lamson*, 2 Allen, 275, 284.

⁵ *Fletcher v. Phelps*, 28 Vt. 262; *Platt v. Jones*, 43 Cal. 219; *Bartlett v.*

Corliss, 63 Maine, 287; *Nickerson v. Crawford*, 16 Maine, 247.

⁶ *White v. Luning*, 93 U. S. 515; *Pride v. Lunt*, 19 Maine, 115; *Hurley v. Morgan*, 1 Dev. & Bat. 425; *Becton v. Chestnut*, 4 Dev. & Bat. 335; *Hill v. Mason*, 7 Jones, 551; *Slade v. Green*, 2 Hawks, 218; *Lynch v. Allen*, 4 Dev. & Bat. 62.

⁷ *Ibid.*; *Emery v. Webster*, 42 Maine, 204; *Gerrish v. Towne*, 3 Gray, 82; *McCuthen v. McCuthen*, 9 Porter, 650; *Jenkins v. Cooper*, 50 Ala. 419; *Williams v. Kivett*, 82 N. C. 110; *Nourse v. Lloyd*, 1 Penn. St. 220; *Couchman v. Thomas*, Hardin (Ky.)

shown that Catawba River was intended;¹ and where land was bounded in a deed "by the side of the mill-pond," parol evidence was admitted of an intent to limit the grant to the margin of the water, as it overflowed in the spring.² In the case of tide waters, the ordinary high-water mark is the boundary of the adjoining lands at common law;³ but in those States in which the title of the owner of the upland extends to low-water mark, the flats pass as appurtenant to, or parcel of, the upland, when that is conveyed, unless a different intention is manifested by the deed.⁴ In Massachusetts and Maine, a grant of the upland, made since the ordinance of 1647, passes the adjoining shore to the extent of the grantor's title, if not restricted by specific description, but bounded generally by the water:⁵ as "by the sea," "tide water," or "salt water,"⁶ "by the harbor,"⁷ "bay,"⁸ "cove,"⁹ "creek,"¹⁰ "river,"¹¹ or "the stream" of a tidal river.¹² So, under this ordinance, a boundary by a tidal creek, the bed of which is bare at low

277; *Jones v. Burgett*, 46 Texas, 285.

¹ *Middleton v. Perry*, 2 Bay, 539.

² *Lowell v. Robinson*, 16 Maine, 357.

³ *Ante*, § 27; *Commonwealth v. Alger*, 7 Cush. 53; *Rogers v. Jones*, 1 Wend. 237; *Canal Commissioners v. People*, 5 Wend. 423, 446; *Wheeler v. Spinola*, 54 N. Y. 377, 385; *State v. Jersey City*, 1 Dutch. 525; *East Haven v. Hemingway*, 7 Conn. 186; *More v. Massini*, 37 Cal. 432; *Milne v. Girodeau*, 12 La. Ann. 324. See *Mayor v. Hart*, 16 Hun, 380.

⁴ *Ante*, § 169.

⁵ *Ante*, § 169. A conveyance of "one-half of the land and flats below the house in quantity and quality," creates an estate in common between the parties. *Adams v. Frothingham*, 3 Mass. 352.

⁶ *Boston v. Richardson*, 105 Mass. 351, 355; 13 Allen, 155; *Storer v. Freeman*, 6 Mass. 435, 439; *Mayhew v. Norton*, 17 Pick. 357; *Valentine v. Piper*, 22 Pick. 85; *Green v. Chelsea*, 24 Pick. 71; *Jackson v. Boston &*

Worcester Railroad Co., 1 Cush. 575, 578; *Saltonstall v. Long Wharf*, 7 Cush. 195, 200; *Doane v. Willcutt*, 5 Gray, 328, 335, 336. In *New York v. Hart*, 16 Hun, 380, it was held that a grant to a town, for the benefit of the public, and bounded by a navigable river, extends to low-water mark.

⁷ *Boston v. Richardson*, 105 Mass. 355; *Mayhew v. Norton*, 17 Pick. 357.

⁸ *Ibid.*; *Partridge v. Luce*, 36 Maine, 16.

⁹ *Hathaway v. Wilson*, 123 Mass. 359.

¹⁰ *Ibid.*; *Harlow v. Fisk*, 12 Cush. 302.

¹¹ *Ibid.*; *Trull v. Wheeler*, 19 Pick. 240; *Moore v. Griffin*, 22 Maine, 350; *Pike v. Monroe*, 36 Maine, 309; *Brackett v. Persons Unknown*, 53 Maine, 238. See *Mobile v. Emanuel*, 1 How. 95; 17 Peters, 155.

¹² *Ibid.*; *Boston v. Richardson*, 13 Allen, 155; *Lapish v. Bangor Bank*, 8 Maine, 85, 92; *Thomas v. Hatch*, 3 Sumner, 170; *Dunlap v. Stetson*, 4 Mason, 366.

water, conveys *prima facie* to the centre of the creek;¹ and if a wharf on the shore be granted, it will carry with it, as parcel of the granted premises, the grantor's flats towards the low-water mark, unless limited by special words.² A grant of "a piece of flats below high-water mark, to set a shop upon, not exceeding forty feet in width," conveys flats of that width to low-water mark.³ A creek or natural channel, from which the tide does not ebb, limits the right to the adjoining flats.⁴

§ 196. In the case of non-tidal waters, also, a deed which describes the land as bounded by the water conveys *prima facie* as far as the grantor owns.⁵ Thus, the term "river," when employed to designate a boundary by land-owners whose title extends *usque ad filum aquae*, means in law the centre of the stream.⁶ This rule applies to a grant from the

¹ Boston v. Richardson, 13 Allen, 146, 155; Harlow v. Fisk, 12 Cush. 302; Chapman v. Edwards, 3 Allen, 512.

² Central Wharf v. India Wharf, 123 Mass. 561, 566; Wood v. Commissioners of Bridges, 122 Mass. 394; Doane v. Broad Street Association, 6 Mass. 332; Storer v. Freeman, 6 Mass. 435; Ashby v. Eastern Railroad Co., 5 Met. 368; Wheeler v. Stone, 1 Cush. 313; Ammidown v. Granite Bank, 8 Allen, 285; Commonwealth v. Alger, 7 Cush. 53, 90; Jackson v. Boston & Worcester Railroad, 1 Cush. 580; 2 Dane Abr. 690, 700; 9 Gray, 524. See Gerrish v. Gary, 120 Mass. 132; Adams v. Frothingham, 3 Mass. 352; Palmer v. Hicks, 6 Johns. 133; Hodge v. Boothby, 48 Maine, 71; Brookhaven v. Strong, 60 N. Y. 56.

³ Adams v. Frothingham, 3 Mass. 352.

⁴ Sparhawk v. Bullard, 1 Met. 95; Lufkin v. Haskell, 3 Pick. 355; Walker v. Boston & Maine Railroad, 3 Cush. 1; Attorney General v. Boston Wharf Co., 12 Gray, 553; Porter v. Sullivan, 7 Gray, 441.

⁵ Wright v. Howard, 1 Sim. & Stu. 190; Wishart v. Wyllie, 1 Macq. H. L. 389; Tyler v. Wilkinson, 4 Mason, 397; Thomas v. Hatch, 3 Sumner, 170; Jackson v. Hathaway, 15 Johns. 447; Varick v. Smith, 9 Paige, 547; 5 Paige, 138; Walton v. Tift, 14 Barb. 216; Demeyer v. Legg, 18 Barb. 16; Hammond v. McLachan, 1 Sand. 323; Herring v. Fisher, Id. 344; Jackson v. Louw, 12 Johns. 252; People v. Law, 34 Barb. 494; Wetmore v. Law, Id. 515, 519; Grove v. White, 20 Wis. 425; Arnold v. Elmore, 16 Wis. 509; Newhall v. Ireson, 8 Cush. 595; Waterman v. Johnson, 13 Pick. 261; Buck v. Squires, 22 Vt. 484; Stanford v. Mangin, 30 Ga. 355; Williams v. Buchanan, 1 Ired. 535; Rix v. Johnson, 5 N. H. 520; Hammond v. Ridgely, 5 H. & J. 215; Kingsland v. Chittenden, 6 Lans. 15; Muller v. Landa, 31 Texas, 265. See Union Pacific Railroad Co. v. Hall, 91 U. S. 343; Thomas v. Hatch, 3 Sumner, 170; Norris v. Hall, 1 Mich. 202; Richardson v. Prentiss, 48 Mich. 88.

⁶ Ibid.

Crown,¹ a State,² or the United States,³ and to navigable as well as unnavigable fresh streams where the soil of navigable fresh rivers is held to be private property.⁴ In New York it is held⁵ that legislative grants of islands in navigable fresh rivers are not conclusive against the application of the common-law rule to such rivers; but in Pennsylvania⁶ and other States,⁷ such grants have been regarded as strong evidence in favor of the public character of these streams. The rule extending the grantee's title to the centre of the stream applies also when the granted premises are bounded by a ditch or canal made through the grantor's land;⁸ by a mill-pond, created by damming a fresh-water stream,⁹ or by an artificial raceway.¹⁰ It applies to city lots bounded upon streams.¹¹ Even a marsh or swamp may constitute a well-defined boundary of a tract of land, and the thread of the channel or stream flowing through it, if any, may be regarded

¹ Lord v. Commissioners of Sidney, 12 Moo. P. C. 473.

² Boston v. Richardson, 105 Mass. 351, 355; 13 Allen, 156; Lunt v. Holland, 14 Mass. 149; Cold Spring Iron Works v. Tolland, 9 Cush. 492; Claremont v. Carlton, 2 N. H. 369; *Ex parte* Jennings, 6 Cowen, 518; Arthur v. Case, 1 Paige, 447; Coovert v. O'Conner, 8 Watts, 470; Hayes v. Bowman, 1 Rand. 417, 420; Browne v. Kennedy, 5 H. & J. 195; Baltimore v. McKim, 3 Bland Ch. 453; Ridgeley v. Johnson, 1 Bland Ch. 316, n.; Camden v. Creel, 4 W. Va. 365.

³ Middleton v. Pritchard, 3 Scam. 510; Morgan v. Reading, 3 S. & M. 366; Steamboat Magnolia v. Marshall, 39 Miss. 109; Gavit v. Chambers, 3 Ohio, 495; Hendricks v. Johnson, 6 Porter, 472; Jones v. Soulard, 24 How. 41.

⁴ *Ante*, c. 3; Dwyer v. Rich, Jr. R. 4 C. L. 424.

⁵ *Ex parte* Jennings, 6 Cowen, 548, and note; People v. Canal Appraisers, 17 Wend. 571; 13 Wend. 355; Commissioners v. Kempshall, 26 Wend. 404.

⁶ *Ante*, § 65.

⁷ *Ante*, c. 3.

⁸ Boston v. Richardson, 13 Allen, 155; Lawson v. Mowry, 52 Wis. 219; Warner v. Southworth, 6 Conn. 471; Agawam Canal Co. v. Edwards, 36 Conn. 476; Goodyear v. Shanahan, 43 Conn. 204, 210; Cansler v. Henderson, 64 N. C. 469; Hoff v. Tobey, 66 Barb. 347; 56 N. Y. 633.

⁹ Phinney v. Watts, 9 Gray, 269; Waterman v. Johnson, 13 Pick. 261; Paine v. Woods, 108 Mass. 160; Bradley v. Rice, 13 Maine, 198; Lowell v. Robinson, 16 Maine, 357; Mansur v. Blake, 62 Maine, 38; Wood v. Kelley, 34 Maine, 47; Nostrand v. Durland, 21 Barb. 478; Bartholomew v. Edwards, 1 Houst. (Del.) 17; Mill River Co. v. Smith, 34 Conn. 462; Kingsland v. Chittenden, 6 Lans. 15; Primm v. Raboteau, 56 Mo. 407.

¹⁰ Dunklee v. Wilton Railroad Co., 24 N. H. 489; Smith v. Ford, 48 Wis. 115, 163; Pettibone v. Hamilton, 40 Wis. 402.

¹¹ Watson v. Peters, 26 Mich. 508.

as the boundary line.¹ If the land on both sides of a river is owned by tenants in common, and they make partition according to its course, each takes to the thread of the stream.² The fact that the quantity of riparian land called for in a deed is satisfied by the dry land does not limit the boundary to the bank.³ The presumption that a conveyance to the centre line was intended does not arise when land is bounded by a body of water contained in an artificial reservoir constructed for purposes not connected with the premises conveyed, and when such a presumption would be inconsistent with the uses for which the reservoir was created.⁴

§ 197. If the intention to limit the title to the bank does not appear from other terms in the instrument, a description of a riparian estate, by which a line runs to a monument on the bank, and thence "by," "with," "along," or "on" the river, carries title to the thread of the stream, and thence follows the meanders thereof, the monument merely determining the direction of the line towards the river.⁵ When

¹ *Brumagim v. Bradshaw*, 39 Cal. 34; *Felder v. Bonnet*, 2 McMullan (S. C.) 44; *Stapleford v. Brinson*, 2 Ired. 311; *Brooks v. Britt*, 4 Dev. 481; *Spruell v. Davenport*, 1 Jones, 203; *Burnett v. Thompson*, 6 Jones, 210; 7 Id. 407.

² *King v. King*, 7 Mass. 496. See *Morrill v. Morrill*, 5 N. H. 134; *Hanson v. Willard*, 12 Maine, 142; *Smith v. Smith*, 10 Paige, 470; *Cooper v. Cedar Water Power Co.*, 42 Iowa, 398.

³ *Dwyer v. Rich*, Ir. R. 4 C. L. 424.

⁴ *Hoff v. Tobey*, 66 Barb. 347.

⁵ *Child v. Starr*, 4 Hill, 369, 375; 20 Wend. 149; *Jackson v. Snow*, 12 Johns. 202; *Mott v. Mott*, 68 N. Y. 246; *Howard v. Ingersoll*, 13 How. 381, 422; *Johnson v. Pannell*, 2 Wheat. 206; *Littlepage v. Fowler*, 11 Wheat. 215; *Pike v. Moulton*, 36 Maine, 309; *Bradford v. Cressey*, 45 Maine, 13; *Low v. Tibbetts*, 72 Maine,

92; *Robinson v. White*, 42 Maine, 209; *Grant v. White*, 63 Penn. St. 271; *Smallwood v. Hatton*, 4 Md. Ch. 95; *Thomas v. Godfrey*, 3 Gill & J. 42; *Wood v. Appal*, 63 Penn. St. 210; *Motley v. Sargent*, 119 Mass. 231; *Dunlap v. Stetson*, 4 Mason, 349; *Thomas v. Hatch*, 3 Sumner, 170; *Hughes v. Providence Railroad Co.*, 2 R. I. 508; *Berridge v. Ward*, 10 C. B. n. s. 400; *Kimball v. Kenosha*, 4 Wis. 321; *Goodeno v. Hutchinson*, 54 N. H. 157; *Reed's Petition*, 13 N. H. 381; *Rix v. Johnson*, 5 N. H. 520; *Leigh v. Jack*, 28 Am. L. Reg. 540, and note; *Paine v. Woods*, 108 Mass. 160, 171; *Walker v. Shepardson*, 4 Wis. 486; *Sizer v. Devereux*, 16 Barb. 160; *Coover v. O'Conner*, 8 Watts, 470; *Bishop v. Seeley*, 18 Conn. 393; *McCullough v. Wall*, 4 Rich. (S. C.) 84; *Jackson v. Louw*, 12 Johns. 252; *Jones v. Pettibone*, 2 Wis. 308; *Weakly v. Legrand*, 1 Tenn. 265; *Buck v.*

the line along the river is to run a stated distance, the meanderings of the stream are to be followed until the required distance, reduced to a straight line, is attained.¹

In *Luce v. Carley*,² in New York, where the description began at a "tree standing on the east branch of the Onondaga River," and after giving other courses and distances, proceeded west "to the east bank of the river; then south along the Onondaga River to the first-mentioned bounds," the grant was held to extend to the centre of the stream. In *Cold Spring Iron Works v. Tolland*,³ in Massachusetts, the corner was a tree on the bank, but the land was described as bounding on the river, the centre of which was held to be the boundary line. In *Newton v. Eddy*,⁴ in

Squiers, 22 Vt. 489; *Marsh v. Burt*, 34 Vt. 289; *Morrow v. Willard*, 30 Vt. 118; *Maynard v. Weeks*, 41 Vt. 619; *Buckley v. Blackwell*, 10 Ohio, 508; *Massengill v. Boyles*, 4 Humph. 205; *Burns v. Greaves*, *Cooke* (Tenn.) 75; *Elder v. Burrus*, 6 Humph. 364; *Martin v. Nance*, 3 Head, 649; *Stuart v. Clark*, 2 Swan, 9; *Sandifer v. Foster*, 1 Hay. (N. C.) 237; *Hartsfield v. Westbrook*, *Ibid.* 258; *McPhaul v. Gilchrist*, 7 Ired. 169; *Cansler v. Henderson*, 64 N. C. 469; *Rogers v. Mabe*, 4 Dev. (N. C.) 180; *Smith v. Auldridge*, 2 Hay. (N. C.) 382; *Conder v. Coor*, *Ibid.* 183; *Slade v. Neal*, 2 Dev. (N. C.) 61; *Bruce v. Morgan*, 1 B. Mon. 26; *Calk v. Stribbling*, 1 Bibb, 122; *Horton v. Roscoe*, 3 Hawks, 21; *Morgan v. Livingston*, 6 Martin, 19. See *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 16; *Higbee v. Camden Railroad Co.*, 20 N. J. L. Eq. 435; *Fleming v. Kenny*, 4 J. J. Marsh, 158; *Hills v. Houston*, 4 Sawyer, 195; *Granger v. Swart*, 1 Woolw. 88; *Babcock v. Utter*, 1 Abb. (N. Y. App.) 27; 1 Keyes, 115, 397. A grantee of land, who takes a deed bounding by a river, is not estopped thereby to set up a title afterwards acquired by disseisin in land extending beyond the thread of the stream. *Kinsell v. Daggett*, 11 Maine, 309. See *Corning*

v. Troy Iron Factory, 40 N. Y. 191; 34 Barb. 529.

¹ *Hicks v. Coleman*, 25 Cal. 142; *Sanders v. Morrison*, 2 Mon. (Ky.) 110; *Johnson v. Brown*, *Sneed* (Ky.) 50; *Galveston Co. v. Tankersley*, 39 Texas, 651; *Yoder v. Swope*, 3 Bibb, 205. When the tract is bounded by a navigable stream, the distance upon the stream will, it is said, be ascertained, in the absence of other controlling facts, by measuring in a straight line from the opposite boundaries. *People v. Henderson*, 40 Cal. 29, 32.

² 24 Wend. 451; *Seneca Nation v. Knight*, 23 N. Y. 498; *Halsey v. McCormick*, 3 Kernan, 297; *County of St. Clair v. Lovington*, 23 Wall. 46, 64; *Jones v. Soulard*, 24 How. 44. See *Hughes v. Providence & Worcester Railroad*, 2 R. I. 515; *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn. 103.

³ 9 Cush. 492; *Knight v. Wilder*, 2 Cush. 210; *Newhall v. Ireson*, 9 Gray, 262; 13 Gray, 263; *Beahan v. Stapleton*, 13 Gray, 427; *Morrison v. Keen*, 3 Maine, 474; *Mayo v. Quinby*, 3 Dane Abr. 4; *Ipswich, petitioners*, 13 Pick. 431.

⁴ 23 Vt. 319; *Morrow v. Willard*, 30 Vt. 118.

Vermont, the land was described as bounded "easterly on a creek, and down said creek to a small butternut tree, which is the northeast corner of said lot," and the corner was held to be at the centre of the stream opposite the tree.

§ 198. The thread of a private stream is the line midway between the banks at the ordinary state of the water, without regard to the channel or the lowest and deepest part of the stream,¹ and if the land upon one side is gradually and imperceptibly wearing away, and soil is deposited upon the other, it is the thread of the stream for the time being, and not that which existed when the opposite owners acquired their titles, which forms the boundary between their estates.² In those States in which navigable fresh-water streams are held to be common property, like tide waters, no description in a private grant can carry the grantee's title beyond the line of low-water mark.³ And if such a grant is bounded by a great pond or lake, which is public property, it extends to that line.⁴

§ 199. If the conveyance does not bound the land by the water, but refers to the shore or the land under the water as the boundary, it does not pass such shore or land.⁵ Thus,

¹ *Hopkins Academy v. Dickinson*, 9 Cush. 552; *Boscawen v. Canterbury*, 23 N. H. 188; *Plymouth v. Holder-ness*, cited 28 N. H. 217.

² *Niehaus v. Shepherd*, 26 Ohio St. 40; *ante*, § 166; *Primm v. Walker*, 38 Mo. 94, 98; *Mincke v. Skinner*, 44 Mo. 92.

³ *Martin v. Nance*, 3 Head, 649; *McManus v. Carmichael*, 3 Iowa, 1; *ante*, c. 3; *Wood v. Appal*, 63 Penn. St. 210.

⁴ *Canal Commissioners v. People*, 5 Wend. 423, 447; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Champlain Railroad Co. v. Valentine*, 19 Barb. 484; *Wheeler v. Spinola*, 54 N. Y. 377; *Waterman v. Johnson*, 13 Pick. 261, 265; *West Roxbury v. Stoddard*, 7

Allen, 158, 167; *Paine v. Woods*, 108 Mass. 160, 170; *Wood v. Kelley*, 30 Maine, 47, 55; *Fletcher v. Phelps*, 28 Vt. 257; *Austin v. Rutland Railroad Co.*, 45 Vt. 215; *Sloan v. Biemiller*, 34 Ohio St. 492; *ante*, §§ 79-85; *State v. Gilmanton*, 9 N. H. 461; *Hathorn v. Stinson*, 10 Maine, 238; *Dillingham v. Smith*, 3 Maine, 370.

⁵ *Boston v. Richardson*, 13 Allen, 154; 105 Mass. 351; *Hatch v. Dwight*, 17 Mass. 289; 9 Gray, 524; *Jones v. Soulard*, 24 How. 41; *Bradford v. Cressey*, 45 Maine, 9; *Dunlap v. Stetson*, 4 Mason, 349; *Nickerson v. Crawford*, 16 Maine, 245; *Clement v. Burns*, 43 N. H. 616; *Sanders v. McCracken*, *Hardin (Ky.)* 258.

under the above ordinance of 1647, the flats do not pass, in the absence of an expressed or implied intention to the contrary,¹ if the granted premises are bounded by the "beach,"² "shore,"³ "flats,"⁴ by the high-water mark,⁵ by a "cliff,"⁶ "marsh,"⁷ or on a "way," or "street," extending along the edge of the water.⁸ In *Doane v. Willcutt*,⁹ the land was bounded "by the sea or beach," and this description, referring both to the water and the land, was held to convey the shore to low-water mark.

§ 200. Upon the same principle, a deed conveying land adjoining a private fresh-water stream may so refer to the bank or margin of the water as to make that a monument. Thus, in *Hatch v. Dwight*,¹⁰ in Massachusetts, the description was: Beginning at the end of a dam, running up the river two rods, and so round to the bank of the river; and it was held that the bed of the stream did not pass. In *Bradford v. Cressey*,¹¹ in Maine, where a line was to run to a creek, thence "on the west bank of said creek," the river was held to be

¹ *Hathaway v. Wilson*, 123 Mass. 359; *Doane v. Willcutt*, 5 Gray, 328; *Chapman v. Edmands*, 3 Allen, 512; *Luffkin v. Haskell*, 3 Pick. 355.

² *Niles v. Patch*, 13 Gray, 254; *Tappan v. Burnham*, 8 Allen, 65; *East Hampton v. Kirk*, 68 N. Y. 459; *6 Hun*, 257.

³ *Storer v. Freeman*, 6 Mass. 435; *Chapman v. Edmands*, 3 Allen, 512; *Montgomery v. Reed*, 69 Maine, 510.

⁴ *Storer v. Freeman*, 6 Mass. 439; *Saltonstall v. Long Wharf*, 7 Cush. 195; 9 Gray, 524.

⁵ *Lapish v. Bangor Bank*, 8 Maine, 85.

⁶ *Baker v. Bates*, 13 Pick. 256; *East Hampton v. Kirk*, 84 N. Y. 215.

⁷ *Rust v. Boston Mill Corporation*, 6 Pick. 166. See *Brumagim v. Bradshaw*, 39 Cal. 34.

⁸ *Codman v. Winslow*, 10 Mass. 149; *Charlestown v. Tufts*, 111 Mass. 348; *Cook v. Farrington*, 10 Gray, 70; *Commonwealth v. Alger*, 7 Cush. 53, 77. A covenant is implied, in a deed

of land bounded by a way or street, that such way or street exists, even when the land is below high-water mark. *Parker v. Smith*, 17 Mass. 412.

⁹ 5 Gray, 328; *Storer v. Freeman*, 6 Mass. 439; 9 Gray, 525; *Boston v. Richardson*, 105 Mass. 351.

¹⁰ 17 Mass. 289; *Boston v. Richardson*, 13 Allen, 155.

¹¹ 45 Maine, 9; *Bradley v. Rice*, 13 Maine, 198; *Hathorn v. Stinson*, 10 Maine, 224; *Lincoln v. Wilder*, 29 Maine, 169; *Stone v. Augusta*, 46 Maine, 127; *Brown v. Chadbourne*, 31 Maine, 9; *Erskine v. Moulton*, 66 Maine, 276; *Nickerson v. Crawford*, 16 Maine, 245; *Dunlap v. Stetson*, 4 Mason, 349; *Jackson v. Halson*, 5 Cowen, 216; *Hayes v. Bowman*, 1 Rand. 417; *Daniels v. Cheshire Railroad Co.*, 20 N. H. 85. See *Buck v. Squires*, 22 Vt. 484; *Cole v. Haynes*, Id. 589; *Sanders v. McCracken*, Hardin, 258.

excluded. So, in *Child v. Starr*,¹ in New York, it was held that a boundary line running "eastwardly to the Genessee River, thence northwardly along the shore of said river," conveyed no part of the bed of the stream beyond low-water mark, the controlling words being "along the shore of said river." In *Lamb v. Rickets*,² in Ohio, the deed called for a corner on the bank of a stream, thence south, thence east, thence north to the bank of the stream, "and with the course of the bank to the place of beginning," and the low-water mark of the stream was held to be the boundary. In *Rockwell v. Baldwin*,³ in Illinois, boundaries "to the west side of Cedar Creek, thence down the west line of said creek to the north line of said quarter section," were held to be limited to the bank of the creek. In *Cook v. McClure*,⁴ in New York, it was held that a line commencing at "a stake near the high-water mark" of an artificial pond, and running thence "along the high-water mark of said pond to the upper end of said pond," was a fixed boundary, and that the grantee could not claim accretions. If the deed contains a double description "along the river" and "a marked line," the river, being a natural boundary, will control the marked line.⁵

¹ 4 Hill, 369; 5 Denio, 599 (overruling s. c. 20 Wend. 149); *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van De Bogert*, 56 N. Y. 526; *Sizer v. Devereux*, 16 Barb. 160; *Seneca Nation v. Knight*, 23 N. Y. 498; *Bissell v. New York Central Railroad Co.*, 23 N. Y. 64; *Kingsland v. Chittenden*, 6 Lans. 15; *Varick v. Smith*, 9 Paige, 547; *Ex parte Jennings*, 6 Cowen, 536, and note; *Kingman v. Sparrow*, 12 Barb. 201; *Hammond v. McLachlan*, 1 Sand. (N. Y.) 323; *Paul v. Carver*, 26 Penn. St. 203; *Cox v. Freedley*, 33 Penn. St. 129; *Bishop v. Seeley*, 18 Conn. 393.

² 11 Ohio, 311, 325; *Hopkins v. Kent*, 9 Ohio, 13. In the earlier case of *McCulloch v. Aten*, 2 Ohio, 309, 425, where the call was for "a white oak on the south-east bank of G. creek, thence down said creek, with

the several meanderings thereof," the low-water mark was treated as the boundary. See this case explained in *Benner v. Platter*, 6 Ohio, 504, 508. In *Benner v. Platter*, it was held that a call in a survey for an unnavigable stream is a call for the main branch of such stream, and the boundary is the middle of the stream. See, also, as to boundaries upon streams having different branches or forks, *Doddridge v. Thompson*, 9 Wheat. 469; *Graves v. Fisher*, 5 Maine, 69; *Carter v. Oldham*, *Hughes* (Ky.) 345; *Johnson v. Brown*, *Sneed* (Ky.) 49.

³ 53 Ill. 19. See, also, *Murphy v. Copeland*, 51 Iowa, 515; *Grand Rapids Railroad Co. v. Heisel*, 38 Mich. 62, 72; *Smith v. Ford*, 48 Wis. 117.

⁴ 58 N. Y. 437.

⁵ *Lynch v. Allen*, 4 Dev. & Bat. 62.

§ 201. In *Bowman v. Farmer*,¹ in New Hampshire, the deed described one line as "beginning at the mouth of Black Brook, on the south side of the brook, and running from thence up said brook due west until it strikes the common land," and it was held that the brook, which was very crooked, was not designated as a boundary with sufficient certainty to control the point of the compass stated to be due west. In *Thomas v. Godfrey*,² in Maryland, a patent calling for the main falls of a river, and thence "with the main falls by a direct line to the first bound tree," was held not to follow the meanders of the stream.

§ 202. By the common law, parishes or towns upon tide waters extend, like private estates, only to the high-water mark, unless proved by grant, prescription, or usage to include the shore.³ When separated by a fresh-water river, its thread is *prima facie* the boundary between them,⁴ and the same rules of construction apply as in the case of a grant from one individual to another.⁵ Between nations, the thread of a boundary river, whether tidal or fresh, is presumably the line of separation, although the use of the whole river for the purpose of navigation, trade, and passage may be common to both nations.⁶ But when one State, being

¹ 8 N. H. 402. See, also, *Mas-sengill v. Boyles*, 4 Humph. 205; 11 Humph. 112. The phrase "up the brook," if not controlled by other terms in the deed, calls for a line following the windings of the stream. *Jackson v. Louw*, 12 Johns. 252; *Budd v. Brooke*, 3 Gill, 198.

² *Thomas v. Godfrey*, 3 Gill & J. 142; *Smallwood v. Hatton*, 4 Md. Ch. 95, 99; *Hammond v. Ridgely*, 5 H. & J. 245. In *Corsey v. Hammond*, 1 H. & J. 190, it was left to the jury to decide as to the construction of the deed.

³ *Hale, De Jure Maris*, c. 4; *Hargrave's Law Tracts*, 27; *Reg. v. Musson*, 8 El. & Bk. 900; *Bridgewater Trustees v. Bootle*, L.-R. 2 Q. B. 4; 7 B. & S. 348; *Boston v. Richardson*,

105 Mass. 358; *Pratt v. State*, 5 Conn. 390; *Hayden v. Noyes*, Id. 395.

⁴ *Rex v. Landulph*, 1 M. & R. 393; *State v. Gilmanton*, 14 N. H. 467; *Boscawen v. Canterbury*, 23 N. H. 188; *State v. Canterbury*, 28 N. H. 195; *Crosby v. Hanover*, 36 N. H. 404; *Plymouth v. Holderness*, cited 28 N. H. 217; *Ipswich, petitioners*, 13 Pick. 431; *Cold Spring Iron Works v. Tolland*, 9 Cush. 492; *Boston v. Richardson*, 13 Allen, 146, 157. See *Thomaston v. St. George*, 17 Maine, 117.

⁵ *Granger v. Avery*, 64 Maine, 292; *Perkins v. Oxford*, 66 Maine, 545.

⁶ *Ante*, § 64; *The Schooner Fame*, 3 Mason, 147; *Wheat. Elements Int. Law*, 346; *Wheat. Law of Nations*,

the owner of the territory upon both sides of a river, grants to another State a portion of it bounded by the river, it retains the soil of the river bed, and the grantee takes only to low-water mark.¹ This depends, however, upon considerations derived from the law of nations, and not from the rules of municipal law governing common assurances of estates.²

§ 203. The proprietors of lands upon a natural fresh-water lake or pond, which is public by reason of its size, and the waters of which rise and fall at different seasons of the year, hold to low-water mark, and grants bounded by such waters extend to that line.³ The great lakes of the North appear to be less subject than streams and smaller lakes to an appreciable rise and fall of the water produced by a wet or dry season or by spring freshets.⁴ In the case of *Seaman v. Smith*,⁵ in Illinois, it was held that the boundary of land

577. See *Missouri v. Iowa*, 7 How. 660; 10 How. 1. The eastern boundary of Iowa, declared by statute to be "the middle of the main channel of the Mississippi River," and the western boundary of Illinois, declared by another statute to be "the middle of the Mississippi River," are the *filum aquae*, the middle of the main stream of the river and not the middle of the deep water used by vessels. *Dunleith Bridge Co. v. Dubuque County*, 55 Iowa, 558.

¹ *Handly v. Anthony*, 5 Wheat. 374; *Howard v. Ingersoll*, 13 How. 381; *Alabama v. Georgia*, 23 How. 535; *Commonwealth v. Garner*, 3 Gratt. 655.

² *Boston v. Richardson*, 13 Allen, 146, 157.

³ *Canal Commissioners v. People*, 5 Wend. 423, 446; *Wheeler v. Spinola*, 54 N. Y. 377; *Champlain Railroad Co. v. Valentine*, 19 Barb. 484; *Fletcher v. Phelps*, 28 Vt. 257; *Jake-way v. Barrett*, 38 Vt. 316, 323; *Austin v. Rutland Railroad Co.*, 45 Vt. 215; *Mariner v. Schulte*, 13 Wis. 692; *Wood v. Kelly*, 30 Maine, 47, 55; *Waterman v. Johnson*, 13 Pick. 261,

265, explained in *Paine v. Woods*, 108 Mass. 160, 170; *West Roxbury v. Stoddard*, 7 Allen, 158, 167; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27, 28; *Mill River Woollen Manuf. Co. v. Smith*, 33 Conn. 463; *State v. Milk*, *Chicago Legal News* (1882), p. 262.

⁴ See *Seaman v. Smith*, 24 Ill. 521, 523. In *Rice v. Ruddiman*, 10 Mich. 125, 138, *Christiancy, J.*, said: "The rise and fall of Lake Michigan, and other great lakes of the same chain, is not a tide occurring at regular intervals, like that of the ocean, nor does it arise from the same cause. And though it is probable their waters may be slightly affected by lunar attraction, and a very minute tide may perhaps be detected by a long and careful course of observation with accurate instruments, yet the court must judicially notice that it must be too slight to be recognized by ordinary observation, and to serve any practical purpose in determining the extent of riparian ownership. These facts were judicially noticed in *Lorman v. Benson*, 8 Mich. 18."

⁵ 24 Ill. 521. See, also, *Delaphine v. Chicago Railway Co.*, 42 Wis. 214,

described in a deed which called for Lake Michigan as a line was the line of the water as it usually stands when unaffected by storms or other disturbing causes. If an artificial pond, like a mill-pond, is created by expanding a flowing stream by a dam, the title of the riparian owner extends *prima facie* to the centre of the pond as it did previously in the case of the stream, unless the pond has been so long kept up as to become permanent and to have acquired another well-defined boundary.¹ And if what was originally

225; Sloan v. Biemiller, 34 Ohio St. 492.

¹ Phinney v. Watts, 9 Gray, 260; Paine v. Woods, 108 Mass. 160, 170; Waterman v. Johnson, 13 Pick. 261; Wheeler v. Spinola, 54 N. Y. 377; Robinson v. White, 42 Maine, 209; Hathorn v. Stinson, 10 Maine, 224, 238; 12 Maine, 183; Bradley v. Rice, 13 Maine, 198, 201; Wood v. Kelley, 30 Maine, 47; Lowell v. Robinson, 16 Maine, 357, 361; Mansur v. Blake, 62 Maine, 38; Primm v. Walker, 38 Mo. 94, 98. In Paine v. Woods, 108 Mass. 160, 170, Gray, J., states and interprets the earlier Massachusetts case of Waterman v. Johnson, 13 Pick. 261, as follows: "Waterman v. Johnson, 13 Pick. 261, was the case of a complaint under the mill act for flowing land described in the deed under which the complainant claimed title as bounded by 'Jones River Pond,' a large natural pond, which before the date of the deed had at times been raised to a certain line by means of a dam of permanent materials, adapted in its ordinary use to raise the water to that line. The judge at the trial ruled that the high-water mark of the pond as thus extended would *prima facie* be considered as the boundary of the complainant's land; but admitted parol evidence to show, and the jury found, that at the time of the conveyance a certain natural bank or barrier, which was not thus overflowed, and which the natural pond had never overflowed, was intended and agreed

upon by the parties as the marginal line of the pond referred to in the deed. The full court, in the judgment delivered by Chief Justice Shaw, after stating the general rules of law, that, when the description of a boundary in a deed had a definite legal meaning, parol evidence was inadmissible to control it; that, by legal operation, a boundary by the sea or salt water gave a title in the soil to low-water mark; a boundary upon a river not navigable, to the thread of the stream; upon a large natural pond, having a definite low-water line, to that line; and upon an artificial pond raised by a dam swelling a stream, over its banks, to the thread of the stream, unless the pond had been so long kept up as to have become permanent and to have acquired another well-defined boundary; expressed an opinion that under the peculiar circumstances of the case, the parol evidence was rightly admitted, and held that there was no ground in point of law, or upon the evidence in the case, upon which the respondents could claim that the grant did not extend, in the direction of the pond, as far as the barrier. Upon that case, it is to be observed: first, the ruling at the trial, that the boundary was *prima facie* to be considered as the high-water mark of the pond; as artificially raised, was inconsistent with the opinion of the full court; second, the only point necessarily involved in the decision was, that the grant was not ex-

a natural pond has been for a long time enlarged by artificial means or diminished by the deepening of its outlet, grants of land bounded by the pond extend to the margin of the water as it stands at the time of the conveyance.¹ If the margin varies at different seasons of the year, the grant includes the land which is uncovered at low-water;² and if the pond is artificially raised only in winter, and retains its natural level in summer, the low-water mark in summer is the boundary, though the deed may have been executed in the winter.³ If land is described as bounded "along the high-water mark of the pond," the boundary is fixed and does not follow the changes in the high-water mark.⁴ A change in the water of a lake or pond from fresh to salt, caused by cutting a channel between it and an arm of the sea, and making it subject to the daily rise and fall of the tide, does not affect the boundaries of the riparian owners, who continue to hold to the former low-water mark, notwithstanding the rule which makes the high-water mark the boundary of lands upon tide waters.⁵ It should also be

tended too far by carrying its effect to the natural barrier; third, that decision was equally sustained, whether the parol evidence was admitted, or the terms of the grant by their own force extended so far; fourth, the admission of the parol evidence was based upon the theory that the boundary on the pond, as applied to the subject matter, was governed by no settled rule of legal construction, but created a latent ambiguity; and the rules for the construction of similar grants were not then as fully established in this Commonwealth as they have since been by the later decisions already referred to. For instance, in *Tyler v. Hammond*, 11 Pick. 193, in the previous year, the court had held that a boundary by a highway generally extended only to the margin of the way—a doctrine wholly repudiated by the modern decisions. *Newhall v. Ireson*, 8 Cush. 595; *Phillips v.*

Bowers, 7 Gray, 21; *Boston v. Richardson*, 13 Allen, 146; *Stark v. Coffin*, 105 Mass. 328."

¹ *Bradley v. Rice*, 13 Maine, 198; *Wood v. Kelly*, 30 Maine, 47, 55; *Robinson v. White*, 42 Maine, 209; *Nelson v. Butterfield*, 21 Maine, 220, 229. See the last case upon the question when an arm of a pond is enclosed within the lines of land conveyed, so as to be included in the grant. A lease for 500 years of a factory lot and dam lot, "together with all the land which may be flowed by raising said dam" to a certain height, conveys all the land under the pond, and passes the pond of water and the fish therein, as incidents of the principal grant. *Smith v. Miller*, 5 Mason, 191.

² *Wood v. Kelley*, 30 Maine, 47.

³ *Paine v. Woods*, 108 Mass. 160.

⁴ *Cook v. McClure*, 58 N. Y. 437.

⁵ *Wheeler v. Spinola*, 54 N. Y. 377.

observed in this connection that no title is acquired to the bed of a public or a private lake, by the existence of an easement of maintaining a dam for twenty years at its outlet, and flooding back the water over the bed of the lake and the adjacent lands.¹ Such overflowing does not constitute an ouster.²

¹ *Perrine v. Bergen*, 2 Green (N. J.) 355; *Cochecho Co. v. Strafford*, 51 N. H. 455, 461; *Green v. Harman*, 4 Dev. (N. C.) 158; *Everett v. Dockery*, 7 Jones (N. C.) 390. The person who has maintained a dam at the outlet of a lake or pond for twenty years, and thereby held back the water, is not liable to be taxed for the bed of the lake, or for the lands so flowed on its borders. 51 N. H. 455.

² *Ibid.*

PART II.

PRIVATE WATERS.

CHAPTER VI.

RIGHTS OF RIPARIAN PROPRIETORS IN THE NATURAL FLOW AND CONDITION OF THE STREAM.

SECTION.

- 204. Rights of different proprietors upon a fresh-water stream to the flow of the water.
- 205. Right to the ordinary and extraordinary use of the water.
- 206-209. The right of each proprietor limited by a like right in the other proprietors to use the stream.
- 210. Evidence and effect of judgments.
- 211-211 *b*. Measure of damages for flowage.
- 211 *c*. Flowing caused by combination of natural and artificial causes.
- 212. Flowing when a public nuisance.
- 213-215. Diversion.
- 216. Diversion caused by alterations in the surface of one's own land.
- 217. Diversion for irrigation.
- 218. Obstruction of the natural current.
- 219-222. Pollution.
- 223. Remedies for pollution.
- 234. Rights of non-riparian proprietors.
- 225. Right of adjoining land-owners in artificial watercourses.

§ 204. Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration.¹ Each proprietor may, therefore, insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level.² The proprietors have no property in the flowing water, which is indivisible and not the subject of riparian ownership,³ but may use it

¹ *Shury v. Piggot*, 3 Bulst. 339; *Poph. 166*; *Brown v. Best*, 1 Wilson, 174; *Palmer v. Heblethwaite*, *Skinner*, 65, 175; *Rutland v. Bowler*, *Palmer*, 290; *Miner v. Gilmour*, 12 Moo. P. C. 156; *Wright v. Howard*, 1 Sim. & Stu. 190; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Rex v. Trafford*, 1 B. & Ad. 259; *Saunders v. Newman*, 1 B. & Ald. 253; *Wood v. Waud*, 3 Exch. 748; *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinoti*, 1 C. B. N. s. 590; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Chasemore v. Richards*, 5 H. & N. 989; 2 H. & N. 181; 7 H. L. Cas. 349; *Crossley v. Lightowler*, L. R. 3 Eq. 296; *Frankum v. Falmouth*, 6 C. & P. 5; *Rawstron v. Taylor*, 11 Exch. 332; *Williams v. Morland*, 2 B. & C. 510; *Bealey v. Shaw*, 6 East, 203; *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *Duncombe v. Randall*, *Hetley*, 32; *Atchison v. Peterson*, 20 Wall. 507; *Davis v. Getchell*, 50 Maine, 602; *Pillsbury v. Moore*, 44 Maine, 154; *Johns v. Stevens*, 3 Vt. 308; *Anthony v. Lapham*, 5 Pick. 175; *Cary v. Daniels*, 8 Met. 466; *Pratt v. Lamson*, 2 Allen, 375; *Tourtletot v. Phelps*, 4 Gray, 270; *Whitney v. Eames*, 11 Met. 517; *Merrifield v. Worcester*, 110 Mass. 219; *Cowles v. Kidder*, 24 N. H. 365; *Agawam Canal Co. v. Edwards*, 36 Conn. 476; *Buddington v. Bradley*, 10

Conn. 213; *Gillett v. Johnson*, 30 Conn. 180; *King v. Tiffany*, 9 Conn. 162; *Hutchinson v. Coleman*, 5 Hal. (N. J.) 74; *Bowman v. Wathen*, 2 McLean, 376; *Dilling v. Murry*, 6 Ind. 324; *Mitchel v. Parks*, 26 Ind. 354; *Rhodes v. Whitehead*, 27 Texas, 304; *Shreve v. Voorhees*, 2 Green Ch. 25; *Hill v. Newman*, 5 Cal. 445; *McDonald v. Askew*, 29 Cal. 207; *Hendricks v. Johnston*, 6 Porter 472; *Moffett v. Brewer*, 1 G. Greene, 348; *Overton v. Sawyer*, 1 Jones, 308; *Haynes v. Gratt*, 1 McCord, 543; *Omelvany v. Jagers*, 2 Hill (S. C) 634; *Martin v. Jett*, 12 La. 501; *Davis v. Fuller*, 12 Vt. 178; *Johns v. Stevens*, 3 Vt. 308; *Adams v. Barney*, 25 Vt. 225; *Martin v. Bigelow*, 2 Aik. (Vt.) 24; *Howe Scale Co. v. Terry*, 47 Vt. 109. And see cases cited *post*, § 214.

² *Ibid.*; *Tillotson v. Smith*, 32 N. H. 94.

³ *Ibid.*; *Acton v. Blundell*, 12 M. & W. 324; *Owen v. Field*, 102 Mass. 104; *Baltimore v. Appold*, 42 Md. 442; *Pixley v. Clark*, 35 N. Y. 524; *Politt v. Long*, 56 N. Y. 200; 58 Barb. 20; *Corning v. Troy Iron Factory*, 40 N. Y. 101; 39 Barb. 311; 34 Barb. 485; 6 How. Pr. 89; *Clinton v. Myers*, 46 N. Y. 511; *Townsend v. McDonald*, 2 Kern. 391; *Arnold v. Foot*, 12 Wend. 339; *Lancey v. Clifford*, 54 Maine, 437, 439; *Munroe v. Gates*, 48

for any purpose to which it can be applied beneficially and without material injury to others' rights,¹ or for which the fall of the stream may make it available as a motive power.² They may insist that their right to thus use the water shall be regarded and protected as property.³ The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself.⁴ It does not depend upon user, or presumed grant from long acquiescence in the part of other riparian proprietors above and below, but exists *jure naturae* as parcel of the land.⁵ It is not suspended or destroyed by mere non-user,⁶

Maine, 463, 466; 42 Maine, 178; Taylor v. Fickas, 64 Ind. 167; Plumleigh v. Dawson, 1 Gilman, 544; Bliss v. Kennedy, 43 Ill. 67; Druley v. Adam, 102 Ill. 177; 2 Black. Com. 18; Callis on Sewers, 268; Canal Trustees v. Havens, 11 Ill. 554; Cooper v. Williams, 4 Ohio, 286; 5 Ohio, 391; Frazier v. Brown, 12 Ohio St. 299; Tyler v. Wilkinson, 4 Mason, 397; McCord v. High, 24 Iowa, 336; Meyers v. St. Louis, 8 Mo. App. 263; Merrill v. Parker, Cox (N. J.) 460; Mayor v. Commissioners, 7 Penn. St. 348; Hart v. Evans, 8 Penn. St. 13; McCoy v. Danley, 20 Penn. St. 85; Wheatley v. Christman, 24 Penn. St. 298; Beidleman v. Foulk, 5 Watts. 308; Randall v. Silverthorn, 4 Penn. St. 173; Eddy v. Simpson, 3 Cal. 249; McDonald v. Askew, 29 Cal. 200; Dalton v. Bowker, 8 Nev. 190; Kauffman v. Griesmer, 26 Penn. St. 407; Martin v. Riddle, 27 Penn. St. 415; Howell v. McCoy, 3 Rawle, 256; Hoy v. Sterrett, 2 Watts, 327.

¹ Ibid.

² Ibid.; Kidd v. Laird, 15 Cal. 161.

³ Ibid.; Nuttall v. Bracewell, L. R. 2 Ex. 1.; Hadley v. Hadley Manuf. Co.; 4 Gray, 42; Gould v. Boston Duck Co., 13 Gray, 442, 450; Ashley v. Pease, 13 Pick. 268; Blanchard v. Baker, 8 Maine, 253; Keeney Manuf. Co. v. Union Manuf. Co., 39 Conn. 582; McCalmont v. Whitaker, 3 Rawle, 84;

Brown v. Bush, 45 Penn. St. 61; Beissell v. Scholl, 4 Dallas, 211. Water-power, though an incident to property in the land, is itself the subject of property. Tillotson v. Smith, 32 N. H. 94; Brown v. Bush, 45 Penn. St. 61; Eddy v. Simpson, 3 Cal. 249; Kidd v. Laird, 15 Cal. 161.

⁴ Dickinson v. Grand Junction Canal Co., 7 Exch. 299; Wright v. Howard, 1 Sim. & Stu. 190; Wood v. Waud, 3 Exch. 748; Stokoe v. Singers, 8 El. & Bk. 36; Johnson v. Jordan, 2 Met. 239; Crittenden v. Alger, 11 Met. 281; Wadsworth v. Tillotson, 15 Conn. 366, 373; Marlborough Manuf. Co. v. Smith, 2 Conn. 590; Parker v. Griswold, 17 Conn. 299; Harding v. Stamford Water Co., 41 Conn. 87, 12; Gardner v. Newburgh, 2 Johns. Ch. 166; Holsman v. Boiling Spring Co., 1 McCart. 343; Wheatley v. Baugh, 25 Penn. St. 528; Evans v. Merreweather, 3 Scam. 492; Union Mill Co. v. Ferris, 2 Sawyer, 176; Shambleffer v. Peerless Mill Co., 18 Kansas, 24; Williamson v. Lock's Creek Canal Co., 78 N. C. 156; 76 N. C. 478; Pugh v. Wheeler, 2 Dev. & Bat. 50; Hill v. Newman, 5 Cal. 445.

⁵ Ibid.

⁶ Sampson v. Hoddinott, 1 C. B. N. S. 590; Johnson v. Jordan, 2 Met. 239; Pillsbury v. Moore, 44 Maine, 154; Townsend v. McDonald, 12 N. Y. 381, 391; 14 Barb. 460.

although it may be extinguished by the long-continued, adverse enjoyment of others.¹ It is not affected by the use to which the water has been or may be applied.² Nor is it impaired by unity of possession and title in such land with the land above or below it.³ It is a natural right which arises immediately with every new division or severance of the ownership.⁴ "If," says Shaw, C. J.,⁵ "the owner of a large tract, through which a watercourse passes, should sell parcels above and below his own land retained, each grantee would take his parcel with a full right, without special words, to the use of the water flowing on his own land, as parcel, and subject to the right of all other riparian proprietors to have the water flow to and from such parcel. There is no occasion, therefore, for the grantor, in such case, to convey the right of water to the grantee, or reserve the right of water to himself, in express words; because, being inseparable from the land, and parcel of the estate, such right passes with that which is conveyed, and remains with that which is retained."

§ 205. Each riparian proprietor has a right to the *ordinary* use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for his domestic purposes and for his stock.⁶ For these purposes, by the weight of authority, he may, if necessary, con-

¹ Ibid.; *post*, c. 11.

² Van Sickle v. Haynes, 7 Nev. 249.

³ Ibid.; Hazard v. Robinson, 3 Mason, 272.

⁴ Cary v. Daniels, 8 Met. 466, 481; Stockport Water Works Co. v. Potter, 3 H. & C. 326; Hickok v. Parmelee, 21 Conn. 99.

⁵ Cary v. Daniels, 8 Met. 466, 480.

⁶ Miner v. Gilmour, 12 Moo. P. C. 131, 156; Norbury v. Kitchen, 3 F. & F. 292; 9 Jur. n. s. 132; Wood v. Waud, 3 Exch. 748; 13 Jur. 472; Nuttall v. Bracewell, L. R. 2 Exch. 1; Swindon Water Co. v. Wilts Canal Co., L. R. 7 H. L. 697; L. R. 9 Ch. 451; Union Mill Co. v. Ferris, 2

Sawyer, 176; Union Mill Co. v. Dangberg, Id. 450; Slack v. Marsh, 23 Pitts. L. J. 29; Stein v. Burden, 29 Ala. 127; 24 Ala. 130; Springfield v. Harris, 4 Allen, 494; Anthony v. Lapham, 5 Pick. 175, 177; Philadelphia v. Collins, 68 Penn. St. 106; Baltimore v. Appold, 42 Md. 456; Evans v. Merreweather, 3 Scam. 492; Wadsworth v. Tillotson, 15 Conn. 366; Arnold v. Foot, 12 Wend. 330; Crooker v. Bragg, 10 Wend. 260; Gilm. 544; Ferrea v. Knipe, 28 Cal. 343; Hazeltine v. Case, 46 Wis. 391; Rhodes v. Whitehead, 27 Texas, 304; Tolle v. Carreth, 31 Texas, 362; Fleming v. Davis, 31 Texas, 173.

sume all the water of the stream.¹ He has also the right to use it for any other purpose, as for irrigation or manufactures;² but this right to the *extraordinary* use of the water is inferior to the right to its ordinary use; and if the water of the stream is barely sufficient to answer the natural wants of the different proprietors, none of them can use the water for such extraordinary purposes as irrigation or manufactures.³ It was formerly held that the diversion of the water for the purpose of irrigating the land of a riparian proprietor is a natural want, and that an action could not be maintained by a lower proprietor, who is thereby injured for want of irrigation;⁴ but, according to more recent decisions, a diversion of water for this purpose is an extraordinary and not an ordinary use, and can only be exercised reasonably and with a proper regard to the right of the other proprietors to apply the water to the same or other purposes.⁵ The term "domestic purposes" extends to culinary and household purposes, and to the cleansing and washing, feeding and supplying the ordinary quantity of cattle.⁶ It would appear to extend also to brewing,⁷ and the washing of carriages.⁸ But railway companies, as riparian owners, are not entitled to take water for their engines so as to affect injuriously the navigation of the stream or the rights of other riparian owners, such use not being domestic; and the fact that they do not require the water for domestic use does not entitle them to it for other purposes of a different character.⁹ Even when the water is

¹ Ibid. According to some cases the use of the water for culinary purposes and for cattle must not deprive the other proprietors of an equal enjoyment of the same right. *Chatfield v. Wilson*, 31 Vt. 358; 28 Vt. 49; *Blanchard v. Baker*, 8 Maine, 253, 266; *McElroy v. Goble*, 6 Ohio St. 187; *Hough v. Doylestown*, 4 Brews. (Pa.) 342.

² *Post*, § 206.

³ *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Crandall v. Woods*, 8 Cal. 136, 141; *Ellis v. Tone*, 58 Cal. 289.

⁴ *Weston v. Alden*, 8 Mass. 136; *Bent v. Wheeler*, cited in Sullivan's

Land Titles, 273; *Perkins v. Dow*, 1 Root, 535; *Hayward v. Mason*, Id. 537; *Blanchard v. Baker*, 8 Maine, 266.

⁵ *Post*, § 217; *Baker v. Brown*, 55 Texas, 377.

⁶ *Attorney General v. Great Eastern Railway*, 23 L. T. N. S. 344; *Union Mill Co. v. Ferris*, 2 Sawyer, 176.

⁷ *Wilts Canal v. Swindon Water Co.*, L. 9 Ch. 457; *Coulson & Forbes on Waters*, 116.

⁸ *Busby v. Chesterfield Water Co.*, El. Bk. & El. 176; *Coulson & Forbes on Waters*, 116.

⁹ *Attorney General v. Great East-*

to be used for strictly domestic purposes, it is not lawful for one proprietor, wishing so to use it, to so erect dams across the stream that the water, being spread out, is in great measure lost by absorption and evaporation, to the injury of a lower proprietor.¹ In *Roberts v. Richards*,² a small stream flowed from a spring on A's land to his house, by an artificial channel of immemorial antiquity, through land of B. A had had an almost exclusive use of the water for seventy years, when B intercepted and appropriated nearly all the water of the stream. It was held that B was a riparian proprietor, and as such was entitled to thus take the water for ordinary, but not for extraordinary, purposes.

§ 206. The right to such extraordinary use of flowing water is common to all the riparian proprietors.³ It is not an absolute and exclusive right to all the water flowing past their lands, but it is a right to the flow and enjoyment of the stream, subject to a similar right in all the proprietors, their privileges being in all respects equal.⁴ If the reasonable use by one man of this common property does no actual and perceptible damage to the right of the other proprietors to use it, no action lies; but an unreasonable use of it, whereby others are deprived in whole or in part of the common benefit, is an actionable injury,⁵ even though there is

ern Railway Co., 23 L. T. N. s. 344; *Sandwich v. Great Northern Railway*, 10 Ch. D. 707; *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 195; *Garwood v. New York Central Railroad Co.*, 83 N. Y. 400.

¹ *Ferrea v. Knipe*, 28 Cal. 340.

² 50 L. J. Ch. 297; 44 L. T. 271.

³ *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 191, 196; *Merrifield v. Lombard*, 13 Allen, 16; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Van Sickle v. Haynes*, 7 Nev. 249; *Coffman v. Robbins*, 8 Oregon, 278; *Miner v. Gilmour*, 12 Moo. P. C. 131; *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 982; 2 H. & N. 189; *Embrey v. Owen*, 6 Exch. 353; *Tyler*

v. Wilkinson, 4 Mason, 400; *ante*, § 204.

⁴ *Ibid.*; *Gould v. Boston Duck Co.*, 13 Gray, 442, 450; *Haskins v. Haskins*, 9 Gray, 390; *Merrifield v. Worcester*, 110 Mass. 219; *Prentice v. Geiger*, 74 N. Y. 341; *Holden v. Lake Co.*, 53 N. H. 552; *Union Mill Co. v. Dangberg*, 2 Sawyer, 450; *Dumont v. Kellogg*, 29 Mich. 420; *Patten v. Marden*, 14 Wis. 473; *Rudd v. Williams*, 43 Ill. 385; *Rhodes v. Whitehead*, 27 Texas, 304; *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 230, 245; *Hendricks v. Johnson*, 6 Porter, 472.

⁵ *Ibid.*; *Embrey v. Owen*, 6 Exch. 353; *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 196; *Davis v. Getchell*, 50

no present actual damage,¹ and without regard to the question whether the act which causes the injury is wilful or malicious,² or whether notice was given that the rights of others are infringed.³ Their interest being common, different owners in severalty of premises along the stream may join as plaintiffs in a suit in equity to restrain such unauthorized use of the stream as affects them injuriously and in the same way;⁴ and the fact that the sole owner of one mill is also tenant in common of another does not authorize him to so use the water coming to his own mill as to injuriously affect the mill owned in common.⁵ In view of the varying rights of the different riparian owners on the same stream, injunctions should not be granted to regulate such rights, except in clear cases of intentional violation. A decree by which an upper proprietor is restrained from permitting the water to flow over his dam in greater quantities than is needed to run his machinery, and is required to allow it to flow into another mill-pond, according to the natural flow of the stream, discriminates in favor of the lower proprietor and is erroneous.⁶ Riparian owners upon navigable waters cannot lawfully use the water so as to impair the public rights of navigation and fishery; and, by the common law, the right to have fish pass up private rivers from the sea is a common right in all the proprietors upon the stream.⁷ In general, as between themselves, the privileges of riparian proprietors include: first, Rights relating to the flow of the water; second, Rights relating to the taking or diversion of the water; third, Rights relating to the purity of the water.

Maine, 602; *Randall v. Silverthorn*, 4 Penn. St. 173; authorities *ante*, § 204, note 1; *Farrell v. Richards*, 30 N. J. Eq. 511; *Phinizy v. Augusta*, 47 Ga. 260; *Robertson v. Miller*, 40 Conn. 40.

¹ *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 196; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Adams v. Barney*, 25 Vt. 225; *post*, § 214.

² *Honsce v. Hammond*, 39 Barb. 89; *Heywood v. Miner*, 102 Mass. 466;

Twiss v. Baldwin, 9 Conn. 291; *Lawson v. Price*, 45 Md. 123; *Timm v. Bear*, 29 Wis. 254; *post*, § 290.

³ *Rood v. Johnson*, 26 Vt. 64.

⁴ *Emery v. Erskine*, 6 Barb. 9; *Reid v. Gifford*, Hopk. Ch. 416; *Cadigan v. Brown*, 120 Mass. 493; *Ballou v. Hopkinson*, 4 Gray, 324; *ante*, § 121.

⁵ *May v. Parker*, 12 Pick. 34.

⁶ *Hoxsie v. Hoxsie*, 33 Mich. 77.

⁷ *Ante*, § 187.

§ 207. "It is apparent," says Merrick, J.,¹ "that the rights of riparian proprietors on opposite banks of the stream do not depend upon, and are not affected by, the locality of the channel or current through or along which the larger, or even the chief and principal, part of the water flows. Wherever this current may be, the central line in the bed of the stream, parallel to and equally distant from each shore, is the boundary of their lands. And as their respective rights to the use of the water do not result from this line of division, but arise by mere operation of law, as incident to their ownership of the bank, the formation of the bed of the stream, its varying depth, and the consequent course and direction of the current must be circumstances wholly immaterial." "The rule, which is a necessary inference from these principles, that parties so situated are each entitled to the use of an equal share and proportion of the running water, is not only simple, direct, and equitable, but seems to be essential as the only practical rule by which their respective rights can be accurately ascertained or effectively protected. For it must be obvious that the difficulties would often be very great, if not wholly insurmountable, to find the exact course and direction of the channel, or to determine on which side of the boundary line the larger portion of the whole volume of the stream actually flows." As each proprietor has simply the usufruct of the water as it passes along, no exclusive title is acquired to one-half or to any definite part, but each proprietor is entitled, *per my et per tout*, to the use of his proportion of the whole bulk and volume of the stream.² It follows that, although an exclusive use of the water may be acquired by an actual adverse possession and enjoyment,³ yet the mere use by one proprietor of all the water, unaccompanied by any act of exclusion against the other proprietors, or by the assertion of any superior or exclusive claim, is not in its nature adverse and affords no cause of complaint.⁴

¹ Pratt v. Lamson, 2 Allen, 275, 285; Tourtellot v. Phelps, 4 Gray, 376; Webb v. Portland Manuf. Co., 3 Sumner, 189; 3 Law Rep. 374.

² Ibid.

³ Post, c. 11.

⁴ Pratt v. Lamson, 2 Allen, 288; 6 Allen, 457; Pitts v. Lancaster Mills,

§ 208. Every riparian proprietor may make a reasonable use of the stream passing by his land for purposes which are not domestic.¹ With respect to diminution in quantity, or the retardation or acceleration of the current, or any extraordinary use of the water, it is a question of fact for the jury in each case whether the user is reasonable, according to the width and depth of the river, the fall, the volume of water and the state of improvement in manufactures and the useful arts.² This question cannot be determined by the requirements of the defendant's business,³ or the use which was previously made of the stream in the case of a purchase of a mill privilege from the owner of a lower privilege;⁴ but is to be decided by considering merely whether his use of the stream is reasonable and appropriate to the size of the stream and the quantity of water usually flowing therein.⁵ The mere fact that a portion of the water is lost does not give a cause of action;⁶ for some of the water is inevitably absorbed, wasted, or evaporated whenever it is spread in a mill-pond, or when ice is taken from the

13 Met. 156; *Brace v. Yale*, 10 Allen, 444; *Pillsbury v. Moore*, 44 Maine, 154; *Howe Scale Co. v. Terry*, 47 Vt. 109, 126; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Stillman v. White Rock Co.*, 3 Wood. & M. 341.

¹ *Patten v. Marden*, 17 Wis. 473.

² *Holden v. Lake Co.*, 43 N. H. 552; *Norway Plains Co. v. Bradley*, 52 N. H. 110; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 567; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Hays v. Waldron*, 44 N. H. 584; *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 195; *Reg. v. North Midland Railway*, 2 Railway Cases, Pt. I. p. 1; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Miller v. Miller*, 9 Penn. St. 74; *Arnold v. Foot*, 12 Wend. 330; *Bullard v. Saratoga Manuf. Co.*, 77 N. Y. 525; *Phillips v. Sherman*, 64 Maine, 171; *Case v. Weber*, 2 Carter (Ind.) 108; *Cooper v. Hall*, 5 Ohio, 323; *Columbus Gaslight Co. v. Freeland*, 12 Ohio St. 392, 398; *Timm v. Bear*, 29 Wis. 254;

Dilling v. Murry, 6 Ind. 324; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Thurber v. Martin*, 2 Gray, 394; *Hinkley v. Nickerson*, 117 Mass. 213; *Brace v. Yale*, 99 Mass. 488; 97 Mass. 18; *Clinton v. Myers*, 46 N. Y. 511; *Hill v. Ward*, 2 Gilman, 285; *Bisher v. Richards*, 9 Ohio St. 495, 503; *Dumont v. Kellogg*, 29 Mich. 420; *Hettrich v. Deachler*, 6 Penn. St. 32; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162; *Prentice v. Geiger*, 74 N. Y. 340.

³ *Wheatley v. Christman*, 24 Penn. St. 298; *Brace v. Yale*, 10 Allen, 447; 4 Allen, 393; *Perley v. Marshall*, 57 N. H. 206; *Canfield v. Andrew*, 54 Vt. 1.

⁴ *Haskins v. Haskins*, 9 Gray, 390.

⁵ *Gould v. Boston Duck Co.*, 13 Gray, 442; *Springfield v. Harris*, 4 Allen, 494.

⁶ *Bullard v. Saratoga Manuf. Co.*, 77 N. Y. 525.

stream; and, in such cases, no action can be maintained unless the rights of others are materially impaired.¹ In England it is held that any permanent encroachment upon the *alveus* of a running stream may be complained of by an opposite or adjacent proprietor to whose proprietary right the erection is a present sensible injury, without proof that actual damage has been or will be sustained therefrom.² In this country it has been held that an encroachment by one proprietor upon his side of the stream does not give a cause of action to another proprietor without proof of appreciable injury.³ If a riparian owner attempts to authorize a water company to take a supply from a watercourse, thereby causing substantial damage to another riparian owner, such a diversion cannot be regarded as a reasonable use of the common property between the co-owners.⁴

§ 209. When the stream is so used by one proprietor as to injure another proprietor upon the stream, the wrong consists in turning the water where it would not naturally flow; and the source of the water is immaterial, if damage results, whether it is by a retardation or sudden release of the water of the same or another stream, or whether it is made to flow in a course where no water flowed before, or in the channel of an ancient stream.⁵ The injured proprietor is equally entitled to redress whether the damage is caused by a diversion of the water,⁶ by backwater, by inundation from above his land,⁷ or by the percolation of the water

¹ Seeley v. Brush, 35 Conn. 419; Cummings v. Barrett, 10 Cush. 195.

² Brickett v. Morris, L. R. 1 H. L. Sc. 47; Attorney General v. Terry, L. R. 9 Ch. 425; Orr Ewing v. Colquhoun, 2 App. Cas. 839, 853; Attorney General v. Lonsdale, L. R. 7 Eq. 377; Norbury v. Kitchen, 15 L. T. N. S. 501; Menzies v. Breadelbanc, 3 Bligh, N. S. 414.

³ Norway Plains Co. v. Bradley, 52 N. H. 108; Niles Works v. Cincinnati, 2 Disney (Ohio) 400.

⁴ Higgins v. Flemington Water Co., 36 N. J. Eq. 538.

⁵ Tillotson v. Smith, 32 N. H. 90; Butz v. Ihrie, 1 Rawle, 218; Shaw v. Cumiskey, 7 Pick. 76; Tuthill v. Scott, 43 Vt. 525; Doud v. Guthrie, 11 Brad. (Ill.) 194.

⁶ Hodges v. Raymond, 9 Mass. 316; Gilman v. Tilton, 5 N. H. 232; Cowles v. Kidder, 24 N. H. 364; Smith v. Agawam Canal Co., 2 Allen, 355; Stiles v. Hooker, 7 Cowen, 266; Good v. Dodge, 3 Pitts. 557; Rhodes v. Whitehead, 27 Texas, 304; Strout v. Millbridge, 42 Maine, 76.

⁷ Byrd v. Blessing, 11 Ohio St. 365.

through the banks.¹ Each proprietor is entitled to enjoy the natural fall of the stream,² and a mill-owner cannot lawfully appropriate additional power, to the injury of a lower proprietor, by lowering the natural channel even on his own land.³ In Pennsylvania it is held that the method of measuring the fall of the stream by instrumental levellings must yield to actual visible facts;⁴ but the opposite has been held in Minnesota.⁵

§ 210. It is not a trespass to flow the land of another with water by erecting a dam below his land,⁶ for any one may lawfully build a dam on his own land,⁷ and the act, being injurious only in its consequences, is to be redressed by an action on the case.⁸ An injunction may also be granted in cases of flowage when there is a clear violation of the

¹ *Pixley v. Clark*, 35 N. Y. 520; *Cooper v. Barber*, 9 Taunt. 99; *Wilson v. New Bedford*, 108 Mass. 261.

² *McCalmont v. Whitaker*, 3 Rawle, 84; *Brown v. Bush*, 45 Penn. St. 61; *Oakley Manuf. Co. v. Neese*, 54 Ga. 459; *Dorman v. Ames*, 12 Minn. 451; *Plumleigh v. Dawson*, 1 Gilman, 544.

³ *Gleason v. Assabet Manuf. Co.*, 101 Mass. 72; *Arthur v. Case*, 1 Paige, 447; *Webster v. Fleming*, 2 Humph. 518; *Townsend v. McDonald*, 2 Kernan, 391.

⁴ *Brown v. Bush*, 45 Penn. St. 61.

⁵ *Finch v. Green*, 16 Minn. 355. See *Perry v. Binney*, 103 Mass. 156.

⁶ *Perrine v. Bergen*, 14 N. J. L. 357; *Reynolds v. Clark*, Stra. 634; *Cooper v. Hall*, 5 Ohio, 320; 3 Black. Com. 220.

⁷ *Ibid.*; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Snow v. Cowles*, 22 N. H. 302; *Delaware Canal Co. v. Lee*, 22 N. J. 243; *Ten Eyck v. Delaware Canal Co.*, 3 Harr. (N. J.) 200; *Vandewere v. Delaware Canal Co.*, 2 Dutch. 151; *Ward v. Ward*, 2 Zab. 699; *Beissell v. Sholl*, 4 Dall. 211; *Hoy v. Sterrett*, 2 Watts, 327; *Whaler v. Ahl*, 29 Penn. St. 98; *Oregon Iron Co. v. Trul-*

lenger, 3 Oregon, 1; *Shaw v. Etheridge*, 7 Jones (N. C.) 225; *Sackrider v. Beers*, 10 Johns. 241; *Clinton v. Myers*, 46 N. Y. 517; *Bullard v. Saratoga Victory Manuf. Co.*, 13 Hun, 43; *Hill v. Ward*, 2 Gilman, 285; *Johns v. Stevens*, 3 Vt. 308; *Schoff v. Upper Connecticut Improvement Co.*, 57 N. H. 113.

⁸ *Ibid.*; *Hutchinson v. Coleman*, 5 Hal. (N. J.) 74; *Keller v. Stoltz*, 71 Penn. St. 356. Trespass lies under the statutes of Maine. *Reynolds v. Chandler River Co.*, 48 Maine, 513. The declaration or complaint need not aver that the defendant's act was wrongful or without license. *Wilkinson v. Applegate*, 64 Ind. 98; *Akin v. Davis*, 11 Kansas, 580. Where the defendant, who owned a mill above that of the plaintiff on the same stream, wilfully, and with intent to injure the plaintiff, accumulated a large head of water by shutting down his gates, and then discharged an immense volume of water against the plaintiff's dam, which was washed away, trespass *vi et armis* was held a proper remedy. *Kelly v. Lett*, 13 Ired. 50; *Hogwood v. Edwards*, Phil. Law, 350.

plaintiff's right and irreparable injury or danger thereof.¹ In an action for backwater, the plaintiff, in order to recover more than nominal damages, must show that the water flowed back upon his land; that a wrongful act of the defendant caused it so to flow, and that he suffered injury therefrom before suit brought.² The wrong begins when the water is appreciably raised at the point where it leaves the plaintiff's land or is ponded back beyond that point,³ whether the plaintiff has a mill upon his land or not,⁴ and although the water does not overflow his banks.⁵ The owner of the overflowed land may maintain successive actions when, as in the case of the destruction of crops from year to year, the wrong does not involve the destruction of the entire estate or its beneficial use; but recovery in a single suit, for any unauthorized use of the stream, is a bar to a subsequent action, where, as in the case of a permanent and complete deprivation of the use of the land, or of the water of the stream, the injury is of a permanent character and goes to the entire value of the estate.⁶ A judgment for the defend-

¹ *Sheldon v. Rockwell*, 9 Wis. 166; *Cobb v. Smith*, 16 Wis. 601; *Newton v. Allis*, 12 Wis. 378; *Shannon v. State*, 18 Wis. 604; *Halm v. Thornberry*, 7 Bush, 403; *Ogle v. Dill*, 55 Ind. 130; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Fulton v. Greacen*, 36 N. J. Eq. 216; *Bradwell v. Dewell*, 48 Mich. 9. As to the form of a bill in equity to restrain obstruction, see *Rigg v. Hancock*, 36 N. J. Eq. 42. In a suit to lower a dam a mandatory judgment may be issued to lower to the proper height, but neither an extra allowance computed on the value of the land flowed nor the expense of surveys, &c., are allowable. *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 30; *Mark v. Buffalo*, 87 N. Y. 184.

² *Lewin v. Simpson*, 38 Md. 468; *Shafer v. Stonebraker*, 4 Gill & J. 345; *Godfrey v. Maberry*, 84 N. C. 255; *Jones v. Lavender*, 55 Ga. 228; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Brown v. Bowen*, 30 N. Y. 519; *Cobb v. Smith*, 38 Wis.

21; *Langdon v. C. B. & Q. R. Co.*, 48 Iowa, 437. Damages for a continuing trespass are computed only to the beginning of the action. *Close v. Samm*, 27 Iowa, 503.

³ *Heath v. Williams*, 25 Maine, 209; *Munroe v. Gates*, 42 Maine, 178; 48 Maine, 463; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Alexander v. Kerr*, 1 Rawle, 83, 89; *McCalmont v. Whitaker*, 3 Rawle, 84; *Graver v. Sholl*, 42 Penn. St. 58.

⁴ *Hill v. Ward*, 2 Gilman, 285; *Stout v. McAdams*, 2 Scam. 67; *Cory v. Silcox*, 6 Ind. 39; *New Britain v. Sargent*, 42 Conn. 137; *Williamson v. Lock's Creek Canal Co.*, 76 N. C. 443; *Ilatch v. Dwight*, 17 Mass. 280.

⁵ *Garrett v. McKie*, 1 Rich. (S. C.) 444; *Chalk v. McAlily*, 11 Rich. (S. C.) 153; *Little v. Stanback*, 63 N. C. 285; *Johnson v. Roan*, 3 Jones (N. C.) 523; *Burnett v. Nicholson*, 72 N. C. 334.

⁶ *Stodghill v. C. B. & Q. R. Co.*, 53

ant, in a suit for flowing land, is a bar to a subsequent suit between the same parties and depending upon the same facts;¹ but a judgment for the plaintiff in such suit establishes the right and estops the defendant from asserting injury resulting from the same continuing cause.² When successive actions lie, the statute of limitations is not a bar to an action for the continued flooding of land within the statutory period, although the first flowage may be barred.³ Where a stream was obstructed wrongfully, and several years later this act caused the plaintiff's land to be overflowed, it was held that the statute of limitations ran only from the latter event.⁴ If a trespass is committed by breaking barriers, and water is thereby let in, the flow of water is merely consequential, and a verdict for the plaintiff in a suit for breaking the barriers and for damages resulting therefrom precludes the recovery of further damages.⁵ But if a trench is dug or a ditch deepened on a man's own land, whereby water is injuriously diverted from a neighboring stream, or the supply of water to a neighbor's mill is diminished, it is a continuing injury.⁶ The owners of non-riparian lands are entitled to use the stream for drainage, and may

Iowa, 341; *Van Hoozier v. Hannibal Railroad Co.*, 71 Mo. 145; *Dickson v. Chicago Railroad Co.*, 71 Mo. 575; *Close v. Samn*, 27 Iowa, 503; *Hester v. Broach*, 84 N. C. 252; *Bare v. Hoffman*, 79 Penn. St. 71; *Cumberland Canal v. Hitchings*, 65 Maine, 140; *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; *Cobb v. Smith*, 38 Wis. 21; *Fowle v. New Haven Co.*, 107 Mass. 352; 112 Mass. 334.

¹ *Dick v. Webster*, 6 Wis. 681; *McDowell v. Langdon*, 3 Gray, 513.

² *Casebeer v. Mowry*, 55 Penn. St. 419; *Plate v. New York Central Railroad*, 37 N. Y. 472. See *Burwell v. Cannady*, 3 Jones (N. C.) 165.

³ *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675. A recovery for erecting a nuisance bars another action for the erection, but not other actions for the continuance of the

nuisance. *Staple v. Spring*, 10 Mass. 72, 74; *Hodges v. Hodges*, 5 Met. 205. In *McCoy v. Danley*, 20 Penn. St. 85, it was held that, if the continuance of a dam is of great value to the defendant, and causes but considerable injury to the plaintiff, the latter is entitled to such damages as will compel an abatement of the nuisance. *Battishill v. Reed*, 18 C. B. 696. In *White v. Moseley*, 8 Pick. 356, it was held, upon the facts of the case, that two distinct trespasses were committed in removing a dam.

⁴ *Devery v. Grand Canal Co.*, Ir. R. 9 C. L. 194.

⁵ *Clegg v. Dearden*, 12 Q. B. 576.

⁶ *Ibid.* 591; *Schoch v. Foreman*, 3 Brewst. (Penn.) 157. Under a complaint in an action to recover damages for the wrongful obstruction of a watercourse, alleging the tort to

recover on this ground when injured by backwater.¹ Where the materials of a bridge forming part of a discontinued highway were sold by a town to a riparian proprietor, he was held liable to the land-owners above for damages caused by the setting back of the water in consequence of such materials remaining in the river, and was not permitted to set up in defence that he had removed greater obstructions from the river before the purchase.² The plaintiff is always entitled to compensation in money, and it is not an answer to an action for illegal flowage that the mill and dam which caused it are beneficial to the plaintiff or to the public.³

§ 211. In an action for injury to the plaintiff's land by backwater, the measure of damages is the actual injury to the land by the overflow,⁴ or its fair rental value from the time when the injury commenced to the date of the writ.⁵ He may show, in aggravation of damages, that the fertility and future value of the overflowed land are impaired,⁶ and the prospective loss of growing crops or timber when reasonably certain to occur;⁷ the expense of draining off the water standing upon or percolating through the soil;⁸

have been committed on a particular day, evidence of similar torts previously committed is inadmissible. *Noah v. Angle*, 63 Ind. 425. In such case, the opinion of a witness as to the amount of damages resulting from the tort is inadmissible, and the jury must make the estimate from the facts proved. *Ibid*.

¹ *Treat v. Bates*, 27 Mich. 390; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Johnson v. Roan*, 3 Jones (N. C.) 523; *Bowman v. New Orleans*, 27 La. Ann. 501.

² *Talbot v. Whipple*, 7 Gray, 122.

³ *Engard v. Frazier*, 7 Ind. 294; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90; *Webb v. Portland Manuf. Co.*, 3 Sumner, 402; *Marcy v. Fries*, 18 Kansas, 353; *McKellip v. McIlhenny*, 4 Watts, 317.

⁴ *Phinizy v. Augusta*, 47 Ga. 260.

⁵ *Baldwin v. Calkins*, 10 Wend. 167; *Chicago v. Huenerbein*, 85 Ill. 594.

⁶ *Hutchinson v. Granger*, 13 Vt. 386; *Powell v. Lash*, 64 N. C. 456; *Marsh v. Trullinger*, 6 Oregon, 356; *Pixley v. Clark*, 35 N. Y. 579; *Schieble v. Law*, 65 Ind. 332; *Rooker v. Perkins*, 14 Wis. 79; *Bevier v. Dillingham*, 18 Wis. 529; *Brower v. Merrill*, 3 Chand. (Wis.) 46; *Clark v. Nevada Land Co.*, 6 Nev. 203; *Standish v. Washburn*, 21 Pick. 237; *Lincoln v. Copper Manuf. Co.*, 9 Allen, 181, 190; *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675.

⁷ *Folsom v. Apple River Log Driving Co.*, 41 Wis. 602; *Hayden v. Albee*, 20 Minn. 159.

⁸ *Ibid.*; *Clark v. Nevada Land Co.*, 6 Nev. 203; *Chicago Railroad Co. v. Carey*, 60 Ill. 514.

the injurious effect of the water upon a spring or well, whether caused by flowing or percolation;¹ the destruction of a ford;² or the decrease in the productiveness of the neighboring upland by the percolation of water from the millpond.³ In an action for overflowing land by a city reservoir, the law is the same as in the case of damages from a mill-dam.⁴

§ 211 *a*. Flowing meadow or pasture land and thereby destroying grass, which is a natural product of the soil and not an emblement, is waste at common law.⁵ If a dam causes the water of a stream to flow back upon the plaintiff's meadow, on which hay or other property is placed, he is bound to use reasonable care and diligence to protect his property,⁶ and cannot recover from another, who causes his land to be flowed, a greater amount than would have been necessary to protect his property, if reasonable diligence had been used.⁷ But he is entitled to recover, if not guilty of negligence, the full amount of the injury, although it might have been prevented by the expenditure of a smaller amount.⁸ The supposed value of crops which might be raised on the land if it had been cultivated, what the land might produce, or what a crop not planted would sell for when produced, are too uncertain and speculative elements to be included in the damages for deprivation of the use of land.⁹ But evidence is admissible showing how much the crop of one year,

¹ *Lehigh Valley Railroad Co. v. Trone*, 28 Penn. St. 206; *Commonwealth v. Fisher*, 1 Penn. 462; *Neal v. Henry*, Meigs (Tenn.) 17; *Payne v. Taylor*, 3 A. K. Marsh. 328; *Allen v. McCorkle*, 3 Head, 181; *Harding v. Funk*, 8 Kansas, 315.

² *Monson v. Brimfield Manuf. Co.*, 15 Pick. 544.

³ *Trimble v. Gilbert*, 3 Blackf. 218.

⁴ *Brown v. Atlanta*, 66 Ga. 71.

⁵ *Potts v. Clarke*, Spencer (N. J.) 536, 543.

⁶ *Chase v. New York Central Railroad Co.*, 24 Barb. 273.

⁷ *Van Pelt v. Davenport*, 42 Iowa, 308; *Simpson v. Keokuk*, 34 Iowa, 568; *Hoehl v. Muscatine*, 57 Iowa, 444; *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490.

⁸ *Reynolds v. Chandler River Co.*, 43 Maine, 513.

⁹ *Chicago v. Huenerbein*, 85 Ill. 594; *Chicago v. Rock Island Railroad Co.*, 16 Ill. 522. Damages for flowing land cannot be pleaded in set-off, unless liquidated by agreement, and pleaded as on contract. *Pitts v. Holmes*, 19 Cush. 92.

made after the commencement of the action, was less than those of former seasons.¹

§ 211 *b*. If a mill above is obstructed by backwater, evidence may be submitted to the jury of the profits of manufacture at the mill as a means of determining the value of the waterpower, if the declaration alleges such loss of profits;² but the measure of damages is not the loss caused by the stoppage of the mill, but the loss which could not be avoided by the use of other appliances.³ A mill-owner, who, having the right to use a reservoir and dam, is bound to maintain the dam, but does not own the land, is entitled to recover from a lower proprietor upon the stream, who sets the water back upon his dam, for the interference with his easement, including the diminished benefit of the reservoir, the increased expense of repairing the dam, or the obstruction of repairs.⁴ And a mortgagee who is in possession of a mill privilege which is rendered useless by the flowing back of the water, is entitled, as damages, to interest upon the value of the privilege, if unobstructed, from the time of his taking possession.⁵ A declaration in case, which alleges that the defendant unlawfully maintained a dam across a stream, whereby the water was set back upon the plaintiff's land, is sustained by proof that backwater was caused by the act of the defendant in keeping the gates or sluices in the dam shut at times when they should have been open.⁶ If the owner of land on both sides of a stream erects

¹ *Garrett v. Commissioners*, 74 N. C. 388; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457.

² *Plimpton v. Gardiner*, 64 Maine, 360; *Simmons v. Brown*, 5 R. I. 299; *Sumner v. Tileston*, 7 Pick. 198; *Holden v. Lake Co.*, 53 N. H. 552; *White v. Moseley*, 8 Pick. 356; *Taylor v. Dustin*, 43 N. H. 493; *Lawson v. Price*, 45 Md. 123; *Potter v. Froment*, 47 Cal. 165; *Jutte v. Hughes*, 67 N. Y. 267; *Ripley v. Great Northern Railway Co.*, L. R. 10 Ch. 435; *Horton v. Hall* (Pa.), *Chicago Legal News*, Feb.

1882, p. 187. See *Burnett v. Nicholson*, 86 N. C. 99.

³ *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Thompson v. Shattuck*, 2 Met. 615. See *Winne v. Kelley*, 34 Iowa, 339.

⁴ *Robertson v. Woodworth*, 42 Conn. 163. See *Bottomly v. Chism*, 102 Mass. 465.

⁵ *Hatch v. Dwight*, 17 Mass. 289.

⁶ *Hutchinson v. Granger*, 13 Vt. 386.

a dam across it, and causes the water to flow back upon a mill-dam above, which is built partly on land belonging to its owner, and partly on land belonging to the lower proprietor, without his license, the latter is not liable for thus obstructing the wheels of the higher mill.¹

§ 211 *c.* Backwater and other injuries resulting from an interference with the natural flow of the stream may arise from a combination of natural and artificial causes. In an action for flowing land by means of a dam, it is a question of fact for the jury whether the flowage was caused by the dam or by other obstructions;² and evidence is admissible which tends to show that it was produced by a natural cause.³ Where backwater was caused by the narrowness of the stream below a dam, and that circumstance preponderated largely in producing the injury to the plaintiff's land, it was held that there was no cause of action.⁴ But, in general, the fact that the defendant's dam is not the principal cause of the damage, if it clearly causes some part of the damage, would not defeat the action.⁵ A lower proprietor is bound to construct his dam so that it will not throw back the water, in times of ordinary freshets, upon the land of an upper proprietor, and cannot successfully defend upon the ground that his dam causes the flowage only when the stream is swollen.⁶ Under this rule, freshets are regarded

¹ Jewell v. Gardiner, 12 Mass. 311.

² Smith v. Russ, 17 Wis. 227; Brown v. Bush, 45 Penn. St. 61; Dickinson v. Boyle, 17 Pick. 78; Childester v. Consolidated People's Ditch Co., 53 Cal. 56; Chicago Railway Co. v. Hoag, 90 Ill. 339.

³ Grigsby v. Clear Lake Water Co., 40 Cal. 396.

⁴ Buckner v. Athens Manuf. Co., 54 Ga. 84; Brown v. Atlanta, 66 Ga. 71; Monongahela Navigation Co. v. Coons, 6 Penn. St. 383. So, in case of extraordinary floods. China v. Southwick, 12 Maine, 238; Smith v. Agawam Canal Co., 2 Allen, 358; Sprague v. Worcester, 13 Gray, 193; Borchardt

v. Wausau Boom Co., 54 Wis. 107. A verdict for nominal damages will not be set aside when the jury might infer from the evidence that the flowage was occasioned in part by the defendant's acts, although the damage mainly results from other causes. Phillips v. Phillips, 34 N. J. L. 203; Janssen v. Lammers, 29 Wis. 83.

⁵ Ibid.; Monmouth v. Gardiner, 55 Maine, 247.

⁶ Bristol Hydraulic Co. v. Boyer, 67 Ind. 236; Dorman v. Ames, 12 Minn. 451; Pixley v. Clark, 35 N. Y. 525; Cowles v. Kidder, 24 N. H. 331; Davis v. Fuller, 12 Vt. 178; Bell v. McClintock, 9 Watts, 119; Roush v.

as ordinary which are well known to occur in the stream occasionally through a period of years, although at no regular intervals.¹ In proceedings under the mill acts, which authorize the flowage of others' lands, the jury, in estimating damages, may consider the effect of those ordinary periodical freshets which can be foreseen with reasonable certainty.² In Massachusetts it is held that if a dam erected by the owner of lands upon both sides of an unnavigable stream does not ordinarily throw back the water so as to obstruct an ancient mill above, he is not liable if the broken ice formed upon his pond in winter becomes so packed as to press back the water to an unusual extent.³ In New Hampshire it is held that the owner of the dam is liable in such a case, if there is no evidence of a sudden and accidental accumulation of ice by extraordinary means, not liable to occur each winter, or of any unusual state of the water.⁴ In *Proctor v. Jennings*,⁵ in Nevada, where a dam erected on a stream below the plaintiff's mill was not injurious when built, but afterwards extraordinary quantities of sediment, arising from a new process of mining used on the stream above, in connection with the dam, caused the water to flow back and interfere with the mill, the owner of the dam was held not to be responsible for such unforeseen and fortuitous circumstances. So a boom company, incorporated by the legislature of Maine, which erected and maintained its boom without fault or negligence, was held not liable for the

Walters, 10 Watts, 86; *Lehigh Bridge Co. v. Lehigh Navigation Co.*, 4 Rawle, 9; *Wallace v. Headley*, 23 Penn. St. 106; *Casebeer v. Mowry*, 55 Penn. St. 419; *McCoy v. Danley*, 20 Penn. St. 85; *Burbank v. Ditch Co.*, 13 Nev. 431; *Cobb v. Smith*, 38 Wis. 21; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; *Ames v. Cannon Manuf. Co.*, 27 Minn. 245; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *Rex v. Trafford*, 1 B. & Ad. 874; 8 Bing. 204.

¹ *Gray v. Harris*, 107 Mass. 492; *Dorman v. Ames*, 12 Minn. 451.

² *Sabine v. Johnson*, 35 Wis. 185, 203.

³ *Smith v. Agawam Canal Co.*, 2 Allen, 355. See *Shrewsbury v. Brown*, 25 Vt. 197. In general, if a natural cause contributes to an injury which could not happen without fault on the part of the defendant, he is liable. *Dickinson v. Boyle*, 17 Pick. 78; *Salisbury v. Herchenroder*, 106 Mass. 458.

⁴ *Cowles v. Kidder*, 24 N. H. 364; *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105. See *Bell v. McClintock*, 9 Watts, 119.

⁵ 6 Nev. 83.

flowage of land, not taken under its charter, caused by its boom in co-operation with an unusual accumulation of logs and a large rise of water.¹ Where backwater was caused during a part of each year by a peculiar grass which commenced growing in the defendant's reservoir, in which dirt had accumulated, the defendant was held not liable, if the grass would have grown in the channel, had there been no dam or deposit, but liable if the accumulation caused the grass to grow.² And where the proprietors of a canal, in order to prevent the canal bank from bursting under an extraordinary rainfall, the effect of which would have been to destroy the plaintiffs' works and cause devastation through a wide area, opened a sluice and discharged the water from the canal into a brook, which overflowed and flooded the plaintiffs' mines, and it appeared that in any event the plaintiffs' works would have been thus injured, it was held that the injury was *damnum absque injuria*, and that the plaintiffs could not recover even under the compensation clauses of the statute under which the canal was constructed.³ But the owner of a ditch or canal, who negligently permits it to become obstructed with sand, is liable for injuries to the adjoining lands caused by the sand being deposited thereon by water overflowing the banks during a season of periodical high water.⁴

§ 212. If a dam causes the water to be ponded back over a public highway, it is a common nuisance.⁵ So it has been

¹ *Lawler v. Baring Boom Co.*, 56 Maine, 443; *China v. Southwick*, 12 Maine, 238; *Plummer v. Penobscot Lumber Association*, 67 Maine, 363.

² *Knoll v. Light*, 76 Penn. St. 268.

³ *Thomas v. Birmingham Canal Co.*, 49 L. J. 851; 43 L. T. 435.

⁴ *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56. See *Harrison v. Great Northern Railway Co.*, 33 L. J. N. S. (Ex.) 266. Where A, with B's permission, placed a log and rails in a ditch which bounded their lands, in order to prevent it from being choked by silt, and B

afterwards removed the obstruction from his own half of the ditch, causing the ditch to become so obstructed that A's land was overflowed, A was held entitled to maintain an action of trespass against B. *Hogwood v. Edwards*, Phill. N. C. 350.

⁵ *Commonwealth v. Stevens*, 10 Pick. 247; *Monmouth v. Gardiner*, 35 Maine, 347; *Kellogg v. Thompson*, 66 N. Y. 88; *State v. Phipps*, 4 Ind. 515. On an information for obstructing an ancient watercourse to the injury of a highway, it must appear that the public was hindered to

held indictable for a mill-owner to cut his dam during a freshet and thereby to flood a public road, although his purpose is merely to save the dam.¹ If the owner of a mill and dam permits them to decay, and a highway is afterwards made across the land flowed by the dam, he cannot grant the mill privilege and right to flow so as to authorize his grantee to overflow the highway by a new dam on the site of the old.² If a mill-owner negligently maintains a dam or causeway, forming part of a highway which a town is bound to keep in repair, he is liable to the town for such repairs as are made necessary by his negligence.³ When water held by a dam becomes stagnant and so corrupts the atmosphere as to impair the health of the neighborhood,⁴ or when, without causing illness, it makes life and property in the community uncomfortable,⁵ it is indictable and abatable as a nuisance,⁶ and ground for an action,⁷ or for relief in equity by injunction,⁸

make a nuisance; and that is for the jury. *State v. Smith*, 54 Vt. 403.

¹ *State v. Knotts*, 2 Spears (S. C.) 694.

² *Commonwealth v. Fisher*, 6 Met. 433.

³ *Brookfield v. Walker*, 100 Mass. 94; *Andover v. Sutton*, 12 Met. 182.

⁴ *State v. Close*, 35 Iowa, 570; *Gherkey v. Haines*, 4 Blackf. 159; *Rhodes v. Whitehead*, 27 Texas, 304; *State v. Gainer*, 3 Humph. 39; *Kownslar v. Ward*, Gilm. (Va.) 127; *Mayo v. Turner*, 1 Munf. (Va.) 405.

⁵ *Ibid.*; *Eames v. New England Worsted Co.*, 11 Met. 570; *State v. Rankin*, 3 S. C. 438.

⁶ *Ibid.*; *King v. Wharton*, 12 Mod. 510; *Holt*, 499; *State v. Purse*, 4 McCord, 472; *State v. Close*, 35 Iowa, 570; *State v. Bush*, 29 Ind. 110; *Luning v. State*, 1 Chand. (Wis.) 178, 186; 2 Pin. 215; *Douglass v. State*, 4 Wis. 387; *Munson v. People*, 5 Park. C. C. 16; *People v. Townsend*, 3 Hill, 479; *State v. Gainer*, 3 Humph. 39; *Commonwealth v. Clarke*, 1 Marsh. (Ky.) 323. In Virginia, if the dam is not near a public highway, and the

health of a particular locality only is impaired, an indictment will not lie. *Commonwealth v. Webb*, 6 Rand. 726; *Stephen v. Commonwealth*, 2 Leigh, 759; *Maire v. Gallahue*, 9 Gratt. 94; *Kownslar v. Ward*, Gilm. (Va.) 127.

⁷ *Ibid.*; *Story v. Hammond*, 4 Ohio, 376; *Morris v. McCaney*, 9 Ga. 160; *Central Railroad Co. v. Wood*, 51 Ga. 515; *Hamilton v. Columbus*, 52 Ga. 435; *Ellington v. Bennett*, 56 Ga. 158; *Neal v. Henry*, Meigs (Tenn.) 17. In such action, evidence showing the comparative healthfulness of the plaintiff's property, before and after the act complained of, is alone material to the issue. *Watson v. Van Meter*, 43 Iowa, 76.

⁸ *Carlisle v. Cooper*, 21 N. J. Eq. 576; 19 Id. 257; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Nelms v. Morgan*, 44 Ga. 617; *Ogletree v. McQuaggs*, 66 Ala. 580; *Thomas v. Calhoun*, 58 Miss. 80; *Miller v. Trueheart*, 4 Leigh, 569; *Ramsay v. Chandler*, 3 Cal. 90. In such case, the injury must be clearly established. *Ibid.*; *Lassater v. Garrett*, 5 Baxter (Tenn.) 268; *ante*, § 210.

on the part of those suffering special injury. If a corporation, which has purchased a canal, part of the public works constructed by the State, permits water to escape through the bank of the tow-path and form stagnant and noisome pools on the adjoining land not owned by the company, it is indictable for maintaining a nuisance.¹ Length of time does not legalize a public nuisance,² and if a mill-pond which has existed for seventy years corrupts the air, the owner may be indicted.³ But the nuisance must actually exist, and not merely be apprehended, in order to justify an abatement.⁴ Taking ice from the pond during one or two winters, and suggesting means and making efforts to render the pond innoxious, do not amount to such acquiescence in the continuance of the nuisance as precludes an action.⁵ In Massachusetts, damages to lands not flowed by the dam, but rendered less valuable as building lots in consequence of noxious and offensive smells proceeding from the flowed land when not covered by water, are not within the scope of the mill acts.⁶ And if navigable waters, subject to the jurisdiction of a State, are obstructed by a dam or similar structure, which is erected in pursuance of legislative authority, cause the health of the neighborhood to be impaired, the person making the structure is not thereby made subject to a prosecution for maintaining a public nuisance, nor can it be abated as such;⁷ but the legislature, upon

¹ Delaware Division Canal Co. v. Commonwealth, 60 Penn. St. 367.

² *Ante*, § 121; Wright v. Moore, 38 Ala. 593.

³ *Ibid.*; State v. Rankin, 3 S. C. 438.

⁴ Gates v. Blincoe, 2 Dana, 158.

⁵ Adams v. Popham, 76 N. Y. 410. See Heiskell v. Cobb, 11 Heisk. 638; Mosser v. Seeley, 10 Neb. 460.

⁶ Fuller v. Chicopee Manuf. Co., 16 Gray, 46; Eames v. New England Worsted Co., 11 Met. 570. In the above case of Fuller v. Chicopee Manuf. Co., Merrick, J., said: "The law does not justify an allowance for remote, possible, or speculative damages, or damages to any other subject

than land, or by any other means than raising water by a dam for mill purposes. The rule admits all direct damage by raising water upon a complainant's land, or preventing all valuable growth, or by saturating it so as to render it unfit to produce good grass, by separating one part of the complainant's land from another so as to render bridges or causeways necessary, or other direct damage." To the same effect, see Rooker v. Perkins, 14 Wis. 79; Brower v. Merrill, 3 Chand. (Wis.) 46; 3 Phin. 46.

⁷ Depew v. Trustees, 5 Ind. 8; Butler v. State, 6 Ind. 165; Neaderhouser v. State, 28 Ind. 257, 268; Barnes v.

providing just compensation, may require the removal of such works on the ground that they are detrimental to the health of the surrounding country.¹ If a canal company purchases from the State a canal, part of the public works, as it had been constructed by the State, and water escapes through the bank of the tow-path and forms stagnant and noisome pools on adjoining land not belonging to the canal company, the company is indictable for maintaining a nuisance.² The rule of liability for endangering the public health applies only to artificial waters; and the owner of swampy or overflowed lands is not guilty of a public nuisance if he neglects to drain them.³ In New Jersey, the right of the legislature to order low lands to be drained at the expense of the owner is upheld, but this depends upon ancient custom and not upon the ordinary powers of legislation.⁴

§ 213. A riparian proprietor may divert the water from the stream, as it passes through his own land, without license from the proprietors above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors if he restores the water to its natural channel before it enters their land and does not materially diminish its flow.⁵ The distinction is to be

Racine, 4 Wis. 494; *Stoughton v. State*, 5 Wis. 291; *Harris v. Thompson*, 9 Barb. 350; *Williams v. New York Central Railroad Co.*, 18 Barb. 222; *People v. Law*, 34 Barb. 514.

¹ *Miller v. Craig*, 11 N. J. Eq. 175; *Rogers v. Barker*, 31 Barb. 447; *The Wharf Case*, 3 Bland Ch. 442.

² *Delaware Canal Co. v. Commonwealth*, 60 Penn. St. 367.

³ *Woodruff v. Fisher*, 17 Barb. 224.

⁴ *In re Drainage along Pequest River*, 41 N. J. L. 175; 39 Id. 197, 433; 40 Id. 380; 42 Id. 553. *In re Drainage*, 35 N. J. L. 497. See *State v. Clinton*, 39 N. J. L. 656.

⁵ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Sandwich v. Great North-*

ern Railway Co., 10 Ch. D. 707; *Garwood v. New York Central Railroad Co.*, 83 N. Y. 400; 17 Hun, 356; *Pettibone v. Smith*, 37 Mich. 579; *Dilling v. Murray*, 6 Ind. 324; *Norton v. Volentine*, 14 Vt. 239; *Ford v. Whitlock*, 27 Vt. 265; *Canfield v. Andrew*, 54 Vt. 1; *Society v. Morris Canal Co.*, Sax. (N. J.) 157; *Webster v. Fleming*, 2 Humph. 518; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Shamleffer v. Council Grove Peerless Co.*, 18 Kansas, 24. As to the measure of damages, for diversion, in special cases, see *Hanover Water Co. v. Ashland Iron Co.*, 84 Penn. St. 279; *Bare v. Hoffman*, 79 Penn. St. 71; *Stein v. Burden*, 29 Ala. 127; 24

observed between the right to divert or change the course of the stream itself so as to turn it away from a lower proprietor, and the right to take water from the stream.¹ The first is wholly unlawful; the second may be exercised to a reasonable extent. There must not be such an abstraction of the water as will materially interfere with the rights of any other proprietor, and it is no answer to such a violation of right by one party that the other has increased the usefulness of the stream by means of a reservoir higher up, since the private right of one man cannot be taken by another upon the substitution of an equivalent benefit.² Where a lower proprietor, with the consent of proprietors higher up the stream, diverted the water above the plaintiff's land lying upon one side of the stream into a channel which conducted a considerable portion of the water around the plaintiff's land to his own mill below, it was held that this was not such an incidental obstruction or loss of the water as was necessarily consequent upon the lawful use of the stream by one proprietor, giving no ground for an action,³ and that the license of the upper proprietors afforded the defendant no protection as against the plaintiff.⁴ Where the defendant, being one of two tenants in common of a mill upon one side of a stream, and of the water privilege connected therewith, agreed with the plaintiff, his co-tenant, that each should use the mill alternately for several days at a time, and afterwards diverted a portion of the water from the mill-pond by means of a channel, dug upon his own land opposite, for the purpose of driving machinery on that land, an injunction was granted to restrain the diversion during the plaintiff's turn, but relief was refused against the use of the channel, which was not shown to be injurious to

Ala. 130; *Stein v. Ashby*, Id. 521; *Thayer v. Brooks*, 17 Ohio, 489; *Plumleigh v. Dawson*, 1 Gilman, 544.

¹ *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 191; *Dumont v. Kellogg*, 20 Mich. 420; *Wadsworth v. Tillotson*, 15 Conn. 366; *Hartzall v. Sill*, 12 Penn. St. 248; *Coalter v. Hunter*, 4 Rand. 58.

² *Webb v. Portland Manuf. Co.*, 3 Sumner, 189.

³ *Wadsworth v. Tillotson*, 15 Conn. 266; *Harding v. Stamford Water Co.*, 41 Conn. 87.

⁴ *Parker v. Griswold*, 17 Conn. 288; *Armstrong v. Potts*, 23 N. J. Eq. 92; *Larsh v. Test*, 48 Ind. 130.

the common property, or against the diversion of the water through it during the defendant's turn.¹ If water is added to a natural stream by artificial means, it becomes a part of the stream and subject to the same natural rights as the rest of the water.² A riparian proprietor cannot lawfully dig in the bed of a stream, on his own side of the thread, in such manner as to change materially the natural flow of the water;³ and if A diverts more than the natural flow of the water towards the land of B, thereby causing it to flow thereon, B may remedy it by the erection of any dams or banks on his own land.⁴ A lower riparian proprietor is not entitled to maintain an action against an owner above for a diversion of the water, if he is not entitled to the use of the water so diverted by reason of the rights of an intervening proprietor.⁵ The ownership of land abutting on a canal which is a public highway, although it carries title to the centre of the canal, does not give to the land-owner the right to draw off the water through his lot for the purpose of creating a water power.⁶ An upper proprietor is liable in damages at law, or may, in case of irreparable injury, be restrained by injunction,⁷ if he so diverts the stream as to cause the water to be discharged upon the land or into the ditches or mines of a neighbor;⁸ if he so extends a ditch into a marsh upon the border of a lake as to lessen the water power of a river into which the lake empties, and upon which the plaintiff's mills are situated;⁹ or if he exhausts a spring or marsh which

¹ *Bliss v. Rice*, 17 Pick. 23.

² *Wood v. Waud*, 3 Exch. 748, 779; *Davis v. Gale*, 32 Cal. 26; *Druley v. Adams*, 102 Ill. 177; *Adams v. Slater*, 8 Brad. (Ill.) 72.

³ *Van Hoesen v. Coventry*, 10 Barb. 518.

⁴ *Merritt v. Parker*, Coxe (N. J.) 460; ante, § 160.

⁵ *Olney v. Fenner*, 2 R. I. 211.

⁶ *Lawson v. Mowry*, 52 Wis. 219; *Medway Co. v. Romney*, 9 C. B. N. S. 575.

⁷ *Marble v. Adams*, 46 Vt. 496; *Chesapeake Railroad Co. v. Bobbett*, 5 W. Va. 138. Standing by, and per-

mitting another without objection to divert a small stream at great expense, will prevent the obtaining a mandatory injunction. *Slocumb v. C. B. & Q. R. Co.*, 57 Iowa, 675.

⁸ *Musgrave v. Smith*, 26 W. R.; *Shaw v. Cumiskey*, 7 Pick. 76; *Porter v. Dunham*, 74 N. C. 767; *Chapman v. Copeland*, 55 Miss. 476; *Thompson v. Crocker*, 9 Pick. 59; *Boynton v. Rees*, Id. 528.

⁹ *Bennett v. Murtaugh*, 20 Minn. 151; *Curtiss v. Ayrault*, 3 Hun, 487; 47 N. Y. 73; 5 Thomp. & C. 611; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 578. See *Bearce v. Perry*, 117 Mass. 211.

is the source of a watercourse, and thereby stops the stream.¹

§ 214. Although the decisions are not in entire harmony, yet, by the weight of authority, neither an upper or lower proprietor can maintain an action for the diversion, the raising or detention of the water by a neighbor upon the stream, which, being reasonable in mode and degree, is not the cause of actual perceptible damage.² Under this rule, as no right of action accrues until injury is inflicted, no prescription begins to run until that time.³ In the recent English case of *Sandwich v. Great Northern Railway Co.*,⁴ it was held to be within the rights of a railway company, as a riparian owner, to take water from the neighboring stream for the purpose of supplying its engines and station, and that the quantity taken, which did not affect the depth of the stream more than one-fifth of an inch, was reasonable. Actual present damage need not be shown in order to support an action for any extraordinary and unreasonable use of the water by a riparian owner, when the act complained of, if continued, would bar the plaintiff's right,⁵ and nominal damages may

¹ *Arnold v. Foot*, 12 Wend. 330; 394; *Gould v. Boston Duck Co.*, 13 *Fleming v. Davis*, 37 Texas, 173; *Gray*, 442; *Gilmore v. Driscoll*, 122 *Wadsworth v. Tillotson*, 15 Conn. 360; *Mass.* 207; *Heath v. Williams*, 25 *Eulrich v. Richter*, 41 Wis. 318; 37 *Maine*, 209; *Mitchell v. Mayor*, 49 *Wis.* 226; *Williamson v. Lock's Creek* *Ga.* 19; *Holsman v. Boiling Spring* *Canal Co.*, 76 N. C. 478; 78 N. C. 156; *Co.*, 14 N. J. Eq. 345; *Crosby v. Bes-* *Gillett v. Johnson*, 30 Conn. 180. *sey*, 49 *Maine*, 539; *Norton v. Volen-*

² *Elliott v. Fitchburg Railroad Co.*, 10 *Cush.* 191; *Norway Plains Co. v.* *Bradley*, 52 N. H. 108; *Amoskeag* *Manuf. Co. v. Goodale*, 46 N. H. 53; *Tyler v. Wilkinson*, 4 *Mason*, 397; *McElroy v. Goble*, 6 *Ohio St.* 187; *Cooper v. Hall*, 5 *Ohio*, 320; *Long-* *street v. Harkrader*, 17 *Ohio St.* 23; *Garrett v. McKie*, 1 *Rich. (S. C.)* 444; *Chalk v. McAlily*, 11 *Rich. (S. C.)* 153; *Merritt v. Brinkerhoff*, 17 *Johns.* 306. *Scott*, 7 *Watts*, 462.

³ *Murgatroyd v. Robinson*, 7 *El. & Bk.* 391; *Cooper v. Barber*, 3 *Taunt.* 99; *Sturges v. Bridgman*, 28 *Am. L. Reg.* 348; *Angus v. Brown*, 4 *Q. B.* *D.* 162; *Thurber v. Martin*, 2 *Gray*, 394; *Gould v. Boston Duck Co.*, 13 *Fleming v. Davis*, 37 *Texas*, 173; *Gray*, 442; *Gilmore v. Driscoll*, 122 *Mass.* 207; *Heath v. Williams*, 25 *Maine*, 209; *Mitchell v. Mayor*, 49 *Ga.* 19; *Holsman v. Boiling Spring* *Canal Co.*, 76 N. C. 478; 78 N. C. 156; *Co.*, 14 N. J. Eq. 345; *Crosby v. Bes-* *Gillett v. Johnson*, 30 Conn. 180. *sey*, 49 *Maine*, 539; *Norton v. Volen-*

⁴ 10 *Ch. D.* 707; 27 *W. R.* 616; *Dakin v. Cornish*, cited 6 *Exch.* 360; *Cummings v. Barrett*, 10 *Cush.* 191; *Garwood v. New York Central Rail-* *road Co.*, 83 N. Y. 400.

⁵ *Ibid.*; *Rochdale Canal Co. v. King*, 14 *Q. B.* 134; 2 *Sim. n. s.* 78; *Harrop v. Hirst*, L. R. 4 *Ex.* 43; *West-*

be recovered in order to prevent the acquisition of an adverse title by prescription.¹ A riparian proprietor may maintain an action for the diversion of a stream without proof that he has an ancient mill thereon or that he has appropriated the water to any special use,² and is entitled to have the water run through his land undiminished by any persons who are not themselves riparian owners and do not act under the license of such owners.³

- bury *v.* Powel, cited in *Fineaux v. Hovenden*, Cro. Eliz. 664; *Mellor v. Spateman*, 1 W. Saund. 346 (*a*), note; *Bower v. Hill*, 1 Bing. 549; 1 Scott, 526; *Embrey v. Owen*, 6 Exch. 353; *Northam v. Hurley*, 1 El. & Bk. 665; *Chasemore v. Richards*, 7 H. L. Cas. 349; 2 H. & N. 180; 5 H. & N. 982; *Sampson v. Hoddinott*, 1 C. B. n. s. 590; *Crossley v. Lightowler*, L. R. 3 Eq. 296; *Chatfield v. Wilson*, 27 Vt. 670; *Woodman v. Tufts*, 9 N. H. 88; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90; *Butman v. Hussey*, 12 Maine, 407; *Heath v. Williams*, 25 Maine, 209; *Munroe v. Stickney*, 48 Maine, 462; *Blanchard v. Baker*, 8 Maine, 253; *Appleton v. Fullerton*, 1 Gray, 186; *Thompson v. Crocker*, 9 Pick. 58; *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. 241; *Newhall v. Ireson*, 8 Cush. 595; *Stowell v. Lincoln*, 11 Gray, 434; *Lund v. New Bedford*, 121 Mass. 286; *Cook v. Hull*, 3 Pick. 269; *Bliss v. Rice*, 17 Pick. 23; *Union Co. v. Dangberg*, 2 Sawyer, 450; *Whipple v. Cumberland Manuf. Co.*, 2 Story, 664; *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Bullard v. Saratoga Manuf. Co.*, 77 N. Y. 525; *Crooker v. Bragg*, 10 Wend. 260; *Baldwin v. Calkins*, Id. 167; *Palmer v. Mulligan*, 3 Caines, 307; *Platt v. Johnson*, 15 Johns. 213; *Van Hoesen v. Coventry*, 10 Barb. 518; *Thomas v. Brackney*, 17 Barb. 654; *Wadsworth v. Tillotson*, 15 Conn. 366; *Chapman v. Thames Manufacturing Co.*, 13 Conn. 269; *Parker v. Griswold*, 17 Conn. 288; *Branch v. Doane*, 18 Conn. 233; 17 Conn. 402; *Seeley v. Brush*, 35 Conn. 424; *Hulme v. Shreve*, 3 Green, N. J. 116; *Gladfelter v. Walker*, 40 Md. 1; *Pastorius v. Fisher*, 1 Rawle, 27; *Alexander v. Kerr*, 2 Rawle, 83; *Howell v. McCoy*, 3 Rawle, 256; *Ripka v. Sergeant*, 7 Watts & S. 9, 11; *Beissell v. Sholl*, 4 Dallas, 211; *Hartzall v. Sill*, 12 Penn. St. 248; *Graver v. Sholl*, 42 Penn. St. 58; *Dumont v. Kellogg*, 29 Mich. 422; *Plumleigh v. Dawson*, 1 Gilman, 544; *Hill v. Ward*, 2 Id. 285; *Stein v. Burden*, 24 Ala. 130; 29 Ala. 127; *Stein v. Ashby*, 24 Ala. 521; *Close v. Samm*, 27 Iowa, 503; *Watson v. Van Meter*, 43 Iowa, 76; *Cory v. Silcox*, 6 Ind. 39; *Little v. Stanback*, 63 N. C. 285; *Pugh v. Wheeler*, 3 Dev. & Bat. 50; *Chapman v. Copeland*, 55 Miss. 476; *Hendrick v. Cook*, 4 Ga. 24; *Ellington v. Bennett*, 59 Ga. 286; *Green v. Weaver*, 63 Ga. 302; *Attwood v. Fricot*, 17 Cal. 37; *Creighton v. Evans*, 53 Cal. 55; *Welton v. Martin*, 7 Mo. 307; *Smith v. McConathy*, 11 Mo. 517; *Haas v. Choussard*, 17 Texas, 588. And see *ante*, p. 359, n. 1; *post*, c. 12.
- ¹ *Ibid.*; *Wilts Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. 451; L. R. 7 H. L. 697.
- ² *Rutland v. Bowler*, 3 Exch. 290, 774; *Sands v. Trefuses*, Cro. Car. 575; *Cox v. Matthews*, 1 Vent. 237; *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; *Adams v. Barney*, 25 Vt. 225; *Van Sick v. Haynes*, 7 Nev. 249.
- ³ *Hayden v. Long*, 8 Oregon, 244;

§ 215. As each proprietor has no exclusive title to one half or any definite part of the water flowing past his land, he cannot claim the right as against any other proprietor to divert or sever a proportionate part of it.¹ He may divert so much of the water as will not unreasonably impair the rights of other proprietors.² In this respect there appears to be no distinction between the diversion and the detention or other use of the stream. One who wrongfully diverts the water from another's mill so as to diminish its power cannot excuse himself for the injury, to the extent that it is caused by him, by alleging that the plaintiff by his own act, as by alterations in his wheels or machinery, requires more water than previously and has thus caused a loss to himself;³ and the purchaser of an estate upon a stream from which others have unreasonably diverted the water is entitled to recover if such diversion is continued, although he was not informed thereof at the time of his purchase.⁴ Upon the ground of irreparable mischief and to prevent a multiplicity of suits, a court of equity will interfere by injunction to restrain an unlawful diversion of water from a stream.⁵

§ 216. A riparian proprietor may alter the surface of his own land at pleasure, if his operations do not materially affect the usual flow of the stream to another's injury.⁶ If he digs a ditch on his own land through which no water flows when the stream is at its ordinary height, he is not bound to fill the ditch or to maintain embankments to pen in

Nuttall v. Bracewell, L. R. 2 Ex. 1, 7, 11; Covington v. Becker, 5 Nev. 281.

¹ Webb v. Portland Manuf. Co., 3 Sumner, 189; Corning v. Troy Iron Factory, 40 N. Y. 191; Blanchard v. Baker, 8 Maine, 253; Curtis v. Jackson, 13 Mass. 507; Elliott v. Fitchburg Railroad Co., 10 Cush. 191; Vanderburgh v. Vanbergen, 13 Johns. 212; Arthur v. Case, 1 Paige, 447; Parker v. Griswold, 17 Conn. 301; Runnels v. Bullen, 2 N. H. 532; Bare v. Hoffman, 79 Penn. St. 71; Plumleigh v. Dawson, Gilman, 544.

² Ibid.

³ Stickney v. Monroe, 44 Maine, 195; Buddington v. Bradley, 10 Conn. 213; Johnson v. Lewis, 13 Conn. 303; Brooke v. Winter, 39 Ind. 505.

⁴ Atlanta Mills v. Mason, 120 Mass. 244; Chapman v. Copeland, 55 Miss. 476; Shamleffer v. Peerless Mill Co., 18 Kansas, 24.

⁵ Marble v. Adams, 46 Vt. 496; Chesapeake Railroad Co. v. Bobbett, 5 W. Va. 138; Wright v. Moore, 38 Ala. 593.

⁶ Storm v. Manchaug Co., 13 Allen, 10; Bearse v. Perry, 117 Mass. 211.

the water for the benefit of a lower proprietor who attempts to erect a dam without right on his own land,¹ and if after the ditch is dug such lower proprietor is authorized by statute to maintain his dam, this imposes no duty upon the ditch-owner to restore his land to its original condition.² Where the right of flowage is given by statute without creating any easement in the lands of others which are overflowed,³ as is the case with respect to the mill acts of Massachusetts and Wisconsin, one proprietor is under no obligation to keep his land in good condition for his neighbor's mill-pond; and if the mill-owner has begun to raise the dam connected with his mill, intending to raise it to a height which, when completed, will overflow the land of others, they may lawfully dig a canal upon their own land before it is flowed, to prevent the flowing beyond the height to which the water was previously raised.⁴ They are not entitled to draw off the water unreasonably after it has been raised by a dam so authorized, but they may lawfully apply it to any useful purpose, including that of irrigation, the watering of cattle, and the taking of ice, if they do not, in point of fact, and in a perceptible and substantial manner, impair the right to run the mill.⁵

§ 217. The right of a riparian proprietor to divert the water of a stream for the purpose of irrigation is recognized in England,⁶ and generally in this country.⁷ According to

¹ *Bearse v. Perry*, 117 Mass. 211.

² *Ibid.*

³ *Murdock v. Stickney*, 8 Cush. 113; *Lowell v. Boston*, 111 Mass. 466; *Boston Manuf. Co. v. Burgin*, 114 Mass. 340.

⁴ *Storm v. Manchaug Co.*, 13 Allen, 10.

⁵ *Ibid.*; *Cook v. Hull*, 3 Pick. 269; *Paine v. Woods*, 108 Mass. 160, 173.

⁶ *Embrey v. Owen*, 6 Exch. 353; *Sandwich v. Great Northern Railway Co.*, 10 Ch. D. 707, 711; *Chasemore v. Richards*, 2 H. & N. 190; 5 H. & N. 982, 7 H. L. Cas. 349; *Sampson v.*

Hoddinott, 1 C. B. n. s. 590; *Green-slade v. Haliday*, 6 Bing. 379; *Hall v. Swift*, 6 Scott, 167; *Strutt v. Boving-ton*, 5 Esp. 56; *Gale & Whatley on Easements*, 284.

⁷ *Baker v. Blanchard*, 8 Maine, 253, 266; *Davis v. Getchell*, 50 Maine, 604; *Newhall v. Ireson*, 8 Cush. 595; *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 194; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175; *Cook v. Hull*, 3 Pick. 269; *Paine v. Woods*, 108 Mass. 160, 173; *Garwood v. New York Central Railroad Co.*, 83 N. Y. 400, 405; *Farrell v. Richards*,

the later decisions in both countries this is not a natural want, authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable and must not materially affect the application of the water by other riparian proprietors.¹ The extent of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land, abutting on one part of the stream, could not lawfully irrigate such land continually by canals and drains, and so cause a serious diminution of the quantity of water, though there may be no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for the purpose.² If the water used for irrigation is not abstracted on a person's own land, but is withdrawn at a distance above it or returned at a distance below it, this would have a material bearing upon the question of reasonable use with respect to an opposite or other proprietor affected by such diversion.³ So, a riparian proprietor who obstructs the stream by a dam for the purpose of overflowing and irrigating his land, or who diverts the water for such purpose excessively, and without returning the surplus into the natural channel, is liable to the owner of a mill below, the operation of which is thereby impeded,⁴ or to another proprietor below, who only uses the water for irrigation and is deprived of that right to an unreasonable extent.⁵

¹ 30 N. J. Eq. 511; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Union Mill Co. v. Dangberg*, Id. 450; *Ingraham v. Hutchinson*, 2 Conn. 584; *Wadsworth v. Tillotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Conn. 180; *Randall v. Silverthorn*, 4 Penn. St. 173; *Miller v. Miller*, 9 Penn. St. 74; *Tolle v. Correth*, 31 Texas, 362; *Fleming v. Davis*, 37 Texas, 173; *Stein v. Burden*, 29 Ala. 127; 24 Ala. 130; *Potier v. Burden*, 38 Ala. 651; *Blessing v. Blair*, 45 Ind. 546; *Ferreca v. Knipe*, 28 Cal. 343.

¹ *Ibid.* According to earlier authorities, irrigation is a natural want. *Ante*, § 205.

² *Embrey v. Owen*, 6 Exch. 353, 371.

³ *Ibid.*; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Stein v. Burden*, 29 Ala. 127; 24 Ala. 130; *Wadsworth v. Tillotson*, 15 Conn. 366.

⁴ *Cook v. Hull*, 3 Pick. 269; *Colburn v. Richards*, 13 Mass. 420.

⁵ *Anthony v. Lapham*, 5 Pick. 175; *Cummings v. Barrett*, 10 Cush. 186, 195; *Bent v. Wheeler*, 3 Dane Abr. 16.

§ 218. It is not lawful for one proprietor to impede or diminish the ordinary flow of the water so as to materially interfere with the enjoyment of other proprietors;¹ and if the owner of a mill withholds or lets down the water in excessive quantities, beyond what is incident to the necessary or reasonable use of his mill, he is liable to an action of tort at common law for any appreciable damage thereby caused to a lower proprietor.² So if a mill-owner increases the natural flow of the stream by artificial means, as by turning into his mill-pond the waters of another stream, which do not naturally flow there, he is liable to an action for injury so caused to another proprietor.³ It is a reasonable use of the stream by one proprietor to detain the water for such time as is necessary to fill a mill-pond used in connection with machinery, which the power of the stream, in its ordinary stages, is adequate to propel.⁴ In times of drouth, the water may be detained for such length of time as is necessary to enable it to be advantageously and profitably used for such machinery.⁵ If a mill-owner, in seasons of drouth, shuts his gates so as to stop the flow of the water until his pond becomes full, it is not an unreasonable exercise of his right to let down the water and thereby increase the volume of the stream to any extent that does not exceed the

¹ *Embrey v. Owen*, 6 Exch. 353; *Shears v. Wood*, 7 Moore, 534; *Hinckley v. Nickerson*, 117 Mass. 215; *Twiss v. Baldwin*, 9 Conn. 291; *Phillips v. Sherman*, 64 Maine, 171; *Davis v. Winslow*, 51 Maine, 290; *Davis v. Getchell*, 50 Maine, 602; *Timm v. Bear*, 29 Wis. 254; *Vliet v. Sherwood*, 35 Wis. 229; 38 Wis. 159; *Sackrider v. Beers*, 10 Johns. 241; *Hendrick v. Cook*, 4 Ga. 241; *Pool v. Lewis*, 41 Ga. 162; *Hoy v. Sterrett*, 2 Watts, 327; *Hetrick v. Deachler*, 6 Penn. St. 32; *Case v. Weber*, 2 Ind. 108; *Noah v. Angle*, 63 Ind. 425.

² *Clapp v. Herrick*, 129 Mass. 292; *Thompson v. Crocker*, 9 Pick. 59; *Soule v. Russell*, 13 Met. 436; *O'Brien v. St. Paul*, 18 Minn. 176; *Gerrish v.*

Brown, 50 Maine, 604; *Merritt v. Brickerhoff*, 17 Johns. 306; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478.

³ *Tillotson v. Smith*, 32 N. H. 90; *Merritt v. Parker, Cox* (N. J.) 460.

⁴ *Pitts v. Lancaster Mills*, 13 Met. 156; *Chander v. Howland*, 7 Gray, 350; *Whaler v. Ahl*, 29 Penn. St. 98; *Merritt v. Brinckerhoff*, 17 Johns. 306; *Clinton v. Myers*, 46 N. Y. 511; *Hartzell v. Sill*, 12 Penn. St. 245; *Bullard v. Saratoga Victory Manuf. Co.*, 13 Hun, 43; *Mabie v. Matteson*, 17 Wis. 1; *Timm v. Bear*, 29 Wis. 254; *Pool v. Lewis*, 41 Ga. 162; *Oregon Iron Co. v. Trullenger*, 3 Oregon, 1.

⁵ *Ibid.*

usual and natural flow, or overflow the natural banks.¹ But he has no right to erect machinery, requiring for its operation more water than the stream supplies in its ordinary state, and operate such machinery by a full pond, discharging the water upon those below in unusual quantities, so that they are unable to use it.² The right to reasonably detain the water is not limited to extraordinary occasions or to the time necessary for repairs, but applies to the ordinary use of the stream.³ The fact that a mill-owner partially obstructs the flow of the water from his mill does not prevent his maintaining an action against a lower proprietor for an additional obstruction caused by the maintenance of the latter's dam at too great a height, and the doctrine of contributory negligence does not apply to such a case.⁴ The stoppage of a water-course at its springhead, where it has its origin, and first begins to flow in a natural channel, is as unlawful as an obstruction lower down the stream.⁵

§ 219. Riparian owners have, also, a natural right to have natural streams flow unimpaired in quality as well as quantity; and any use of the stream by one proprietor, which defiles or corrupts it to such a degree as essentially to impair its purity and usefulness for any of the purposes to which running water is usually applied, is an invasion of private right, for which those injured thereby are entitled to a remedy.⁶ Various sources of pollution have been held by

¹ *Drake v. Hamilton Woolen Co.*, 99 Mass. 574; *Wood v. Edes*, 2 Allen, 580; *Brace v. Yale*, 10 Allen, 444; 97 Mass. 18; 99 Mass. 488; *Gould v. Boston Duck Co.*, 13 Gray, 453; *Clinton v. Myers*, 46 N. Y. 511. See *Rock Manuf. Co. v. Hough*, 39 Conn. 190.

² *Merritt v. Brinkerhoff*, 17 Johns. 306; *Clinton v. Myers*, 46 N. Y. 511; *Brace v. Yale*, 10 Allen, 441.

³ *Davis v. Getchell*, 50 Maine, 602.

⁴ *Brown v. Dean*, 123 Mass. 254.

⁵ *Dudden v. Guardians of the Poor*, 1 H. & N. 627; *Broadbent v. Rams-*

botham, 11 Exch. 602; *Arnold v. Foot*, 12 Wend. 330; *Howe v. Norman* (R. I.) 13 Reporter (Feb. 1, 1882), p. 155.

⁶ *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; 2 Nev. & Man. 747; *Embrey v. Owen*, 6 Exch. 153; *Wood v. Waud*, 3 Exch. 748; *Bealey v. Shaw*, 6 East, 208; *Aldred's Case*, 9 Co. 59; *Tenant v. Goldwin*, 2 Ld. Raym. 1089; *Salk*, 21, 360; 6 Mod. 311; *Holt*, 500; *Stonehewer v. Farrar*, 6 Q. B. 730; *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77; *Buccleuch v. Cowan*, 2 App. Cas. 311; *Merrifield v. Lom-*

the courts to be actionable; as to set up cattle-yards or lime-pits for calf and sheep skins so near the water as to pollute it;¹ discharging blood from a slaughter-house into the stream;² erecting a cesspool, placing manure, or permitting gas to escape so near a well, spring, or stream, as to contaminate it;³ the casting, upon one's own land, of dirt and foul water or substances which reach the stream by percolation;⁴ the letting off of water made noxious by precipitation of minerals;⁵ or dye wares, or liquors, or madder, indigo, or potash,⁶ or sulphuric⁷ or muriatic⁸ acid; or vitriol, whereby the boilers and machinery of a lower proprietor are corroded;⁹ discharging heated water into a stream injuriously,¹⁰ or sewage;¹¹ or rendering the water unfit for domestic or

bard, 13 Allen, 16; Woodward v. Worcester, 121 Mass. 245; Dwight Printing Co. v. Boston, 122 Mass. 583; McGinness v. Adriatic Mills, 116 Mass. 177; Richmond Manuf. Co. v. Atlantic De Laine Co., 10 R. I. 106; Lewis v. Stein, 16 Ala. 214; O'Riley v. McChesney, 3 Lans. 278; 49 N. Y. 672; Gladfelter v. Walker, 40 Ind. 1; Holzman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Potter v. Froment, 47 Cal. 165; Sanderson v. Pennsylvania Coal Co., 86 Penn. St. 401. An allegation in an action for polluting a stream that "said river flows partly around and partly through plaintiff's land aforesaid," sufficiently shows that he is a riparian proprietor thereon. Greene v. N. 36 Wis. 50.

¹ Year Book, Hen. II. b. 6; Moore v. Webb, 1 C. B. n. s. 673; Coulson v. Forbes on Waters, 170; Greene v. Nunnemacher, 36 Wis. 50; Hazeltine v. Case, 46 Wis. 391; Smith v. McConathy, 11 Mo. 517.

² Attorney General v. Stewart, 20 N. J. Eq. 415; Babcock v. New Jersey Stock Yard Co., Ibid. 296; Woodyear v. Schaefer, 57 Md. 1.

³ Norton v. Scholefield, 9 M. & W. 565; Womesly v. Church, 17 L. T. n. s. 190; Hipkins v. Birmingham Gaslight Co., 6 H. & N. 250; 5 H. & N.

74; Sherman v. Fall River Iron Works, 5 Allen, 213; 2 Allen, 524; Ball v. Nye, 99 Mass. 582; Pottstown Gas Co. v. Murphy, 39 Penn. St. 257; Ottawa Gaslight Co. v. Graham, 35 Ill. 346; Woodward v. Aborn, 35 Maine, 271; Carhart v. Auburn Gaslight Co., 22 Barb. 297; Tate v. Parrish, 7 Mon. (Ky.) 325.

⁴ Hodgkinson v. Ennor, 4 B. & S. 229, 240; Carhart v. Auburn Gaslight Co., 22 Barb. 297; Ball v. Nye, 99 Mass. 582.

⁵ Hodgkinson v. Ennor, 4 B. & S. 229; Wright v. Williams, 1 M. & W. 77; Lincoln v. Taunton Copper Manuf. Co., 9 Allen, 181.

⁶ Wood v. Sutcliffe, 16 Jur. n. s. 75.

⁷ Pennington v. Brinsop, 5 Ch. D. 769.

⁸ Stockport Waterworks Co. v. Potter, 7 H. & N. 160.

⁹ Merrifield v. Lombard, 13 Allen, 16.

¹⁰ Mason v. Hill, 3 B. & Ad. 304; Wood v. Waud, 3 Exch. 748; Tipping v. Eckersley, 2 K. & J. 264.

¹¹ Attorney General v. Cockermouth, L. R. 18 Eq. 172; Attorney General v. Colney Hatch, L. R. 4 Ch. 146; Attorney General v. Leeds, L. R. 5 Ch. 533; Attorney General v. Birmingham, 4 K. & J. 528; Goldsmid v.

culinary purposes,¹ or for cattle to drink of,² or fish to live in,³ or for manufacturing purposes.⁴ If the pollution affects the public, as by urinating in a spring near a highway, from which persons in the vicinity and travellers upon the highway are accustomed to drink, it is the subject of a public prosecution.⁵

§ 220. Proprietors upon streams may cast sewage and waste material therein, if they do not thereby cause material injury to public or private rights.⁶ The natural right of one proprietor to have the stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors, whose fertilization, cultivation or occupation of their own lands, and whose use of the stream for mill and manufacturing purposes, for irrigation, and domestic purposes will tend to make the water more or less impure, especially when the population becomes dense.⁷ So, it is of public importance that the proprietors of useful manufactories should be held responsible only for appreciable injury caused by their works and not for slight

Tunbridge Wells Commissioners, L. R. 1 Ch. 349; Attorney General v. Kingston, 13 W. R. 888; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Attorney General v. Hackney Local Board, L. R. 20 Eq. 626; Poulsum v. Thirst, L. R. 2 C. P. 449; Columbus v. Hydraulic Woollen Mills Co., 33 Ind. 435; Jacksonville v. Lambert, 62 Ill. 519.

¹ Goldsmid v. Tunbridge Wells, L. R. 1 Ch. 349; Howell v. McCoy, 3 Rawle, 256.

² Attorney General v. Birmingham, 4 Kay & J. 528; Manchester Railway v. Workson, 23 Beav. 198; Attorney General v. Luton, 2 Jur. n. s. 181; Oldaker v. Hunt, 6 De G. M. & G. 376; Dwight Printing Co. v. Boston, 122 Mass. 583; Moore v. Webb, 1 C. B. n. s. 673; Sanderson v. Pennsylvania Coal Co., 86 Penn. St. 401.

³ Ibid.; Bidder v. Croydon, 6 L. T.

n. s. 778; Aldred's Case, 9 Rep. 59 a; Seaman v. Lee, 10 Hun, 607.

⁴ Clowes v. Staffordshire Potteries Co., L. R. 8 Ch. 125; Crossley v. Lightowler, L. R. 2 Ch. 478; Lingwood v. Stowmarket Co., L. R. 1 Eq. 77; Tipping v. Eckersley, 2 K. & J. 264; Wood v. Sutcliffe, 2 Sim. N. S. 163.

⁵ State v. Taylor, 29 Ind. 517.

⁶ Haskell v. New Bedford, 108 Mass. 208, 214; Hayes v. Waldron, 44 N. H. 580; Smith v. Barnham, 1 Ex. D. 419; Prentice v. Geiger, 74 N. Y. 341; O'Riley v. McChesney, 49 N. Y. 672; 3 Lans. 278; Thomas v. Brackney, 17 Barb. 654; Palmer v. Mulligan, 3 Caines, 307; Honsee v. Hammond, 39 Barb. 89.

⁷ Merrifield v. Worcester, 110 Mass. 221, 222; Cator v. Lewisham Board of Works, 5 B. & S. 143; Sanderson v. Pennsylvania Coal Co., 86 Penn. St. 401.

inconveniences or occasional annoyances.¹ When an injunction is sought to stop large and expensive works which cause a stream to be polluted, it must clearly appear that the legal remedy is inadequate, and that the plaintiff will suffer irreparable injury from the continuance of the pollution. An injunction will be refused if the plaintiff's premises are several miles below those of the defendant, and the water of the stream in the plaintiff's vicinity is not materially affected.²

"In regard to many uses of the water in streams," says Redfield, C. J.,³ "it has been so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some debris or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. Among these may be named the infusion of soap dyes, and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of saw-dust, to some extent, is nearly indispensable in the running of saw-mills, and most other machinery used in the manufacture of wood and propelled by water power. The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously, would be of little importance in another. There is no doubt one must be

¹ Sanderson v. Pennsylvania Coal Co., 86 Penn. St. 401.

² New Boston Coal Co. v. Pottsville Water Co., 54 Penn. St. 164; Richard's Appeal, 57 Penn. St. 105.

³ Snow v. Parsons, 28 Vt. 459, 461; Jacobs v. Allard, 42 Vt. 403; Canfield v. Andrew, 54 Vt. 1; Prentice v. Geiger, 74 N. Y. 341.

allowed to use a stream in such a manner as to make it useful to himself even if it do produce slight inconvenience to those below." A riparian owner is liable when he permits the drift-stuff from his mill to be carried, by the ordinary force of the current, or by freshets which are likely to occur in the stream, upon the land of a lower proprietor to his injury;¹ when he injures another by an overflow of the water caused by his allowing dirt to accumulate in the channel of the stream,² or in the pool of his dam;³ or when his operations cause refuse or mud to accumulate to an unreasonable amount in a lower dam⁴ or mill-race,⁵ or to obstruct the plaintiff's irrigating ditches.⁶ When the property of others is thus encumbered, the measure of damages is the cost of removing the deposit from the premises, if less than the depreciation in value of the property, and, if greater, then the difference in the value of the property.⁷ The plaintiff cannot recover for such consequential injuries as might have been avoided by timely and reasonable action on his own part;⁸ but the right to damages is not affected by the fact

¹ *Crosley v. Bessey*, 49 Maine, 539; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433; *Easterbrook v. Erie Railroad Co.*, 51 Barb. 94.

Veazie v. Dwinel, 50 Maine, 479; *Gerrish v. Brown*, 51 Maine, 256; *Washburn v. Gilman*, 64 Maine, 163; *Winchester v. Osborne*, 61 N. Y. 555; 62 Barb. 337; *Bushnell v. Proprietors*, 31 Conn. 150; *Robinson v. Black Diamond Coal Co.*, 50 Cal. 460.

² *Carlyon v. Lovering*, 1 H. & N. 784.

³ *Schuylkill Navigation Co. v. McDonough*, 33 Penn. St. 73; *Fehr v. Schuylkill Navigation Co.*, 69 Penn. St. 101.

⁴ *Murgatroyd v. Robinson*, 7 El. & Bk. 391; *Brooke v. Winter*, 39 Md. 505. A reversioner has a right of action for this cause. *Beavers v. Trimmer*, 25 N. J. L. 97.

⁵ *Panton v. Norton*, 18 Ill. 496; *Jones v. Crow*, 32 Penn. St. 398; *Lawson v. Price*, 45 Md. 123.

⁶ *Bell v. Shultz*, 18 Cal. 449; *Levaroni v. Miller*, 34 Cal. 231.

⁷ *Seely v. Alden*, 61 Penn. St. 302;

⁸ *Lawson v. Price*, 45 Md. 123. If land is bought on a stream with the sole purpose of compelling its purchase by the owner of an expensive quartz mill above, the operations of which necessarily deposit large quantities of sand upon this land, the plaintiff's motive may be inquired into upon a bill for an injunction, and he may be left to his remedy at law. *Edwards v. Allenez Mining Co.*, 38 Mich. 46; *Jenkins v. Cooper*, 50 Ala. 419; *Bassett v. Salisbury Manuf. Co.*, 47 N. H. 426. A corporation formed for specific purposes cannot purchase or lease land overflowed, which is not required for its legitimate business, for the sole purpose of instituting a suit for the flooding. *Occum Co. v. Sprague Manuf. Co.*, 34 Conn. 529, 541. But, in general, the defendant, in an action for a trespass

that it is more economical and convenient for the defendant to cast rubbish into the stream than to dispose of it otherwise,¹ or that the defendant's act is supported by usage upon the same or other similar streams.² The vendor of a riparian estate cannot, in derogation of his own grant, continue to pollute the stream in front of the land sold;³ and a person who is in actual occupation and possession of land on a stream, under an executory contract of purchase, has the same right as a riparian proprietor to maintain an action for injuries to his interest caused by fouling.⁴ Where the defendant, in working a coal mine, caused a deposit of coal dust, ashes, sand, and other debris to be carried down by the water of a natural stream and deposited upon the plaintiff's land, he was held liable for the damage so caused, although the stream overflowed the plaintiff's land in its natural course.⁵

§ 221. In *Pennington v. Brinsop Hall Coal Co.*⁶ the plaintiffs claimed both as riparian proprietors and as having a prescriptive right to use the water of the stream for the purposes of their mill, and their bill for an injunction to restrain the pollution of the stream by the defendants was maintained without proof of actual damage. It was held that rights to running water and to light and air are not analogous, and that damages should not be awarded in lieu of the remedy sought. "The rights of the plaintiffs as riparian owners," said Fry, J., "are not limited to their present modes of enjoyment." "It is impossible to foresee what mode of enjoyment the plaintiffs, or their successors in title, may resort to, or the extent of damages which would

or nuisance, has no right to inquire into the good faith of the plaintiff's possession. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.

¹ *Ante*, §§ 209, 211; *Canfield v. Andrew*, 54 Vt. 1.

² *Ibid.*; *Pennsylvania Coal Co. v. Sanderson*, 94 Penn. St. 302; *Hayes v. Waldron*, 44 N. H. 580. But see *Pren- tice v. Geiger*, 74 N. Y. 346; *Snow v.*

Parsons, 28 Vt. 459; *Gould v. Boston Duck Co.*, 13 Gray, 442.

³ *Crossley v. Lightowler*, L. R. 3 Eq. 279; L. R. 2 Ch. 478.

⁴ *Honsee v. Hammond*, 39 Barb. 89.

⁵ *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412.

⁶ 5 Ch. D. 769; 46 L. J. Ch. 773; *Elmhirst v. Spencer*, 2 Mac. & G. 45.

be a compensation for the injury which the continued pollution might cause to such new modes of enjoyment." Respecting the difference between injury and damage, the learned judge further said: "The pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions."

§ 222. If one of two tenants in common of a mill, the rubbish from which obstructs the mills below, does not participate in the wrong, he is not liable for the act of his co-tenant.¹ In general, where two or more persons act independently in producing an injury, they are not jointly liable for the combined results of their acts.² Where suit was brought for damages to a dam filled by deposits of coal dirt from different mines on the stream, some of which were worked by the defendants and their tenants and some by persons not connected with the defendants, the latter were held not liable for the whole damage caused by the deposits, or for the acts of their tenants so far as these were done without their sanction.³ So, where the plaintiff's boarders left his boarding house in consequence of the corrupt and offensive condition of the adjoining stream, caused by the sewage discharged into it from a large number of hotels and other boarding houses before it reached the plaintiff's premises, it was held that each proprietor causing the pollution was liable only to the extent of the wrong committed by him.⁴ Miller, J., said: "The injury was not caused by

¹ *Simpson v. Seavey*, 8 Maine, 138.

² *Little Schuylkill Navigation Co. v. Richards*, 57 Penn. St. 142; *Wheeler v. Worcester*, 10 Allen, 591; *Blaisdell v. Stephens*, 14 Nev. 17; *Southwestern Railroad Co. v. Lee*, 47 Ga. 380; *Long v. Swindell*, 77 N. C. 176; *Richardson v. Emerson*, 3 Wis. 319.

³ *Little Schuylkill Navigation Co. v. Richards*, 57 Penn. St. 142; *Seely*

v. Alden, 61 Penn. St. 302; *Little Schuylkill Navigation Co. v. French*, 81 Penn. St. (Pt. 2) 366; *Sanderson v. Pennsylvania Coal Co.*, 86 Penn. St. 401, 408; *Bard v. Yohn*, 26 Penn. St. 482; *O'Riley v. McChesney*, 3 Lans. 278; 49 N. Y. 672.

⁴ *Chipman v. Palmer*, 77 N. Y. 51; *Sellick v. Hall*, 47 Conn. 260.

the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard to the act of others. The defendant's act, being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true that it is difficult to separate the injury; but that furnishes no reason why one tort-feasor should be liable for the act of others who have no association and do not act in concert with him. If the law were otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution or to adjust the amount among the different parties. So, also, proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others, who severally and independently may have contributed to the injury. Such a rule cannot be upheld upon any sound principle of law." The fact, however, that the stream is fouled by others, even by a large number of persons, is not a defence to a suit to restrain the fouling by one,¹ and if at the time when the defendant began to pollute, the stream was already so much fouled by others as to be unfit for the plaintiff's use, the action would still be maintainable.² These rules are equally applicable when land is *flowed* by the acts of several parties contributing together, though not in com-

¹ Crossley v. Lightowler, L. R. 2 Ch. 482; L. R. 3 Eq. 279; Attorney General v. Leeds Corporation, L. R. 5 Ch. 583; Woodyear v. Schaefer, 57 Ind. 1; Hill v. Smith, 32 Cal. 166.

So of fouling a well. Sherman v. Fall River Iron Works, 5 Allen, 213.

² Ibid.; Tipping v. St. Helen's Smelting Co., 11 H. L. Cas. 642; L. R. 1 Ch. 66; 4 B. & S. 608.

bination or concert. It is not a defence to an action against one of them that all are not joined as defendants, and the fact that the independent trespasses of others also produced injury to the plaintiff can be considered only upon the question of damages.¹ An action for causing the waters of a lake to overflow the plaintiff's land by the maintenance of a dam across one branch of the outlet of the lake lies, although another and higher dam was subsequently erected across the other branch of the outlet by a third person acting separately, and neither dam of itself would cause the flowage.² In *Lull v. Fox Improvement Co.*,³ in Wisconsin, it was held that each of the owners of different dams is liable for the injury occasioned by his own dam, and that the several causes of action cannot be joined in the same suit. The rule which prevents a recovery by one tort-feasor against another, where the negligence or legal fault of both contributes to the injury, does not apply to the obstruction of a stream, and the fact that a mill-owner obstructs the flow of water to his own mill does not prevent his recovering damages from those who cause an additional obstruction.⁴

§ 223. An action for damages may be maintained by a riparian proprietor for pollution of a stream; and a perpetual injunction may be granted to restrain the nuisance, if it is of a continuous nature, even when the plaintiff could only recover nominal damages at law, because of the in-

¹ *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Green Bay Canal Co.*, 35 Wis. 41; *Jones v. United States*, 48 Wis. 385; *Folsom v. Apple River Co.*, 41 Wis. 602; *Richardson v. Kier*, 34 Cal. 63; *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105.

² *Arimond v. Green Bay Canal Co.*, 35 Wis. 41; 31 Wis. 316.

³ 19 Wis. 100. See *Wheeler v. Worcester*, 10 Allen, 591; *Wright v. Cooper*, 1 Tyler (Vt.) 425; 2 *Thompson on Negligence*, 1088. In an action to abate, as a nuisance, a dam

which overflows the plaintiff's land, brought against the person who constructed it, the grantees of the right to use the water are not necessary defendants. *Newell v. Smith*, 26 Wis. 582. The owner of a dam exposes himself to as many suits as there are parties whose rights are injuriously affected by his wrongful acts. *Toothaker v. Winslow*, 61 Maine, 123, 133.

⁴ *Clarke v. French*, 122 Mass. 419; *Brown v. Dean*, 123 Mass. 254; *Williamson v. Yingling*, 80 Ind. 379.

convenience of repeated and successive actions, and of the acquisition of an adverse right to pollute by the continuance of the act for twenty years.¹ The court will not, in general, award damages in lieu of an injunction,² and if it is established that the mischief complained of is a special injury to a private right, even though it may also amount to a public nuisance,³ the plaintiff is entitled to an injunction at once, whatever inconvenience or expense it may cause to the defendant.⁴ Where, however, the difficulty of removing the nuisance is great, the court will suspend the injunction for a time to render its removal possible.⁵ In granting an injunction to restrain pollution by sewage matter, it is the practice in England to grant an immediate injunction restraining any new communications with the stream, and to suspend the operation of the order for a time to enable the defendants to comply with the order by altering their works.⁶ If the injury is caused by the acts of a city in discharging its sewage unlawfully, due regard will be had to the public

¹ *Clowes v. Staffordshire Water Co.*, L. R. 8 Ch. 125, 143; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Swindon Water Co. v. Wilts Canal*, L. R. 7 H. L. 705; *Goldsmith v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 3 Eq. 279; *Harrop v. Hirst*, L. R. 4 Ex. 43; *Attorney General v. Birmingham*, 4 Kay & J. 528; *Nuneaton Local Board v. General Sewage Co.*, L. R. 20 Eq. 127; *Attorney General v. Gee*, L. R. 10 Eq. 131; *Coulson & Forbes on Waters*, 157; *Merrifield v. Lombard*, 13 Allen, 18; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Lewis v. Stein*, 16 Ala. 214; *New Boston Coal Co. v. Pottsville Water Co.*, 54 Penn. St. 164.

² *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 125; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Imperial Gas Co. v. Broadbent*, 7 H. L. 612; *Kerr on In-*

junctions (4th ed.), 44; *Aynsley v. Glover*, L. R. 18 Eq. 544; L. R. 10 Ch. 283; *Dent v. Auction Mart*, L. R. 2 Eq. 283; *Leech v. Schweder*, L. R. 9 Ch. 463.

³ *Haskell v. New Bedford*, 108 Mass. 216; *Reg. v. Bradford Navigation Co.*, 34 L. J. N. S. (Q. B.) 191.

⁴ *Attorney General v. Birmingham*, 4 Kay & J. 520; *Attorney General v. Kingston on Thames*, 34 L. J. Ch. (N. S.) 481.

⁵ *Ibid.*; *Spiker v. Banbury*, L. R. 1 Eq. 42; *Attorney General v. Sheffield*, 3 De Gex, M. & G. 304; *Attorney General v. Leeds Corporation*, L. R. 5 Ch. 583; *Attorney General v. Hackney*, L. R. 20 Eq. 631.

⁶ *Ibid.*; *Attorney General v. Colney Hatch*, L. R. 4 Ch. 146; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. 769; *Attorney General v. Halifax*, 29 L. J. Ch. 129; *Goldsmith v. Tunbridge Wells*, L. R. 1 Ch. 163; L. R. 1 Eq. 349; *Attorney General v. Richmond*, L. R. 2 Eq. 306.

interests, to existing conditions, and the injury which must ensue if the plaintiff's rights are strictly enforced without time to make other provision for the public needs.¹ An injunction in such cases will not be granted except upon notice and hearing.² When conditions are imposed upon a public body for the public benefit, it is no excuse for a breach of such conditions that their observance is not necessary for the protection of the public. If a local board makes an outfall beyond their district, and thereby pours noxious matter into a stream, they cannot excuse themselves on the ground that no damage is caused thereby.³ Where acts of Parliament empowered a water-works company to take water from a stream, and gave them certain rights against mill-owners on the stream with respect to the quantity of water to be taken, but saved all other rights, the company was held to have no power to foul the water so as to interfere with the rights of mill-owners, and an injunction was granted to restrain the pollution.⁴

§ 224. A company which is authorized by the legislature to make a lock navigation in a public stream, has not the privilege of a riparian owner, and has no right to swell the water at all beyond what it derives from its act of incorporation.⁵ And the rights of a riparian proprietor with respect to the stream appear not to be affected by rights which non-riparian proprietors may have acquired to use the water by grant or license from other riparian owners. In *Whaley v. Lang*,⁶ and *Crossley v. Lightowler*,⁷ a non-riparian proprietor,

¹ *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Lillywhite v. Trimmer*, 36 L. J. Ch. (N. S.) 525; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

² *Society v. Butler*, 12 N. J. Eq. 498, 264.

³ *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Attorney General v. Hackney Local Board*, L. R. 20 Eq. 626.

⁴ *Clowes v. Staffordshire Water-works Co.*, L. R. 8 Ch. 125.

⁵ *Monongahela Navigation Co. v. Coon*, 6 Penn. St. 379. In *Hill v. Tupper*, 2 H. & C. 121, it was held that the grantee of an exclusive liberty of putting or using pleasure boats on a canal could not maintain an action in his own name against a stranger who interfered with such exclusive right.

⁶ 3 H. & N. 675; 2 H. & N. 476.

⁷ L. R. 2 Ch. 476.

having a right to take water from a stream, was held not to be entitled to maintain an action for its pollution. In *Stockport Waterworks Co. v. Potter*,¹ a riparian proprietor granted to a water company the right to take water from a river for supplying Stockport with water, and the action was brought by the company for polluting such water. The majority of the court held that a riparian proprietor's rights with respect to the water depend upon his possession of land on the stream, and that a conveyance by him of land not abutting on the stream which affects to grant water rights is valid against the grantor, but does not enable the grantee to sue a third party for an interruption of his rights. Bramwell, B., dissented upon the ground that a man having property may grant to others estates in and enjoyment of it. In *Nuttall v. Bracewell*,² the plaintiff's mill was situate on riparian land, and was supplied with water by an open goit, made in 1804 under a written agreement with the adjoining proprietor above, Mr. Bagshaw, through which water was diverted from the stream, at a little distance from which the mill was situated, by a weir on Mr. Bagshaw's land, which was called Tom Milner's Ing, and was returned to the stream below the mill. The defendant, a higher riparian proprietor, was sued by the plaintiff for diverting water from the stream above the weir, and the action was maintained. Martin, B., said: "It would be competent for Mr. Bagshaw, or his successor in ownership of Tom Milner's Ing, to erect a mill upon it, and take the water from the stream to work it, provided he neither penned back the water upon his neighbor above, nor injuriously affected the volume and flow of the water of the stream to his neighbor below. And the law favors the exercise of such a right; it is at once beneficial to the owner and to the commonwealth. And if this be so, why may not the owners of two adjoining closes agree together for their mutual benefit to take the water through a

¹ 3 H. & C. 300. See *Holker v. Parritt*, L. R. 10 Ex. 59; L. R. 8 Ex. 107. to show actual damages where there is a clear violation of a right and threatened continuance thereof.

² L. R. 2 Ex. 1. In cases of diversion of water, it is not necessary § 214. *Brown v. Ashley*, 16 Nev. 311; *ante*,

goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one. In point of fact, very many goits pass through the land of different land-owners between the place where the water is taken from the stream and the mill where it works the machinery." He was of opinion that although the right to the flow of water in a goit was an easement which could bind the grantor only when created by deed, yet the plaintiff's possession of the goit gave him a right of action against a wrongdoer. Pollock, C. B., and Channell, B., held that the diversion of the stream by means of the goit was lawful, and amounted to a division of the stream into two channels; and that the plaintiff, as a riparian owner on the goit, had all the rights which a riparian owner would have had on a natural stream. In *Bristol Hydraulic Co. v. Boyer*,¹ in Indiana, the plaintiff was a non-riparian proprietor whose land and mills were near to but not upon the Little Elkhart River. The mills were propelled by water taken from that river by means of a dam across it higher up the stream, and conducted through a race from his dam to the mills, and thence by a tail-race back into the river a short distance above its confluence with the St. Joseph River. The defendants' dam, which was across the latter river below the junction of the two streams, backed the water in the plaintiff's tail-race to the obstruction of his mill-wheels. The plaintiff had an easement in the land occupied by his dam, head-race, and tail-race, granted for the purpose of authorizing the diversion and flow of the water, but it did not clearly appear whether he had acquired the right to divert the water from all the riparian owners between his dam and the mouth of his tail-race. The defendants were held liable to the plaintiff.

§ 225. The right to the water of a river flowing in a natural channel, and the right to water flowing through different estates in an artificial channel, such as a canal, aqueduct, or ditch, do not rest on the same principle. In

¹ 67 Ind. 236.

the former case each successive riparian owner is *prima facie* entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership thereof; in the latter, any right to the flow of the water must depend upon some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is brought, or upon some other legal origin.¹ A watercourse, though artificial, may have originated under such circumstances as to give all the rights that riparian proprietors have in a natural stream, or have been so long used as to become a natural watercourse prescriptively.² When the owners of different parcels of land conduct water across such parcels in an artificial channel and do not define their respective interests in the water, they have the same right to its use on their respective lots, as between themselves, as would exist if the artificial watercourse were a natural one.³ In such case, there is an implied obligation upon each proprietor to repair the structure within his premises, unless that method of repairing is impracticable or unreasonable.⁴ A person who diverts a stream through an artificial watercourse, for his own benefit, must construct it in such a manner that it will carry off the water that may flow into it from such floods and rains as happen in the locality.⁵ If one properly opens on his own land a covered drain, which it is his duty to close again in order to prevent the water from setting back and overflowing the adjoining land, he is not liable for any damage to his neighbor's land caused by the sudden overflow of

¹ Remeshur Pershad Narain Singh 383; Reading v. Althouse, 93 Penn. St. 400; Roberts v. Richards, 44 L. T. 121; Wood v. Waud, 3 Ex. 777; n. s. 271; Adams v. Manning, 48 Conn. 477; Weatherby v. Micklejohn, 27 Alb. L. Journ. 76.

³ Townsend v. McDonald, 12 N. Y. 381; 14 Barb. 460.

² Sutcliffe v. Booth, 32 L. J. Q. B. 136; Ivimey v. Stacker, L. R. 1 Ch. 396, 409; Nuttall v. Bracewell, L. R.

⁴ Winslow v. Fuhrman, 25 Ohio St. 639.

2 Ex. 1; Seibert v. Levan, 8 Penn. St.

⁵ Fletcher v. Smith, 2 App. Cas. 781.

the drain, if he uses ordinary care in closing it.¹ If a land-owner employs an independent contractor to construct a drain, he is not liable for the negligence of the latter occurring in his own work in the performance of the contract; but if the thing contracted to be done from its nature creates a nuisance, or if, being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable.² When a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel to the injury of other proprietors along such channel who have erected works or cultivated their lands with reference to the changed condition of the stream,³ or to the injury of those upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing.⁴ Where an artificial watercourse is made solely to get rid of a nuisance to mines, and to enable their proprietors to get the ores lying within the mineral field drained by it, the flow of the water through that channel is, from the nature of the case, of a temporary character, having its continuance only while the convenience of the mine-owner requires it, and a user of the water by others for twenty years, or a longer period, affords no presumption of a grant of any right to the water in perpetuity.⁵ Waters flowing in the canal of a canal company, which by statute is charged with certain duties and made trustee of the canal for the public, stand upon a different footing from waters flowing naturally and from artificial waters of an ordinary character, with respect to the capacity of other persons to acquire a right in them, and if the company cannot make a grant of the water, none can be presumed against them.⁶

¹ *Rockwood v. Wilson*, 11 Cush. 221.

² *Sturges v. Theological Education Society*, 130 Mass. 414.

³ *Belknap v. Trimble*, 3 Paige, 577; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Middleton v. Gregorie*, 2 Rich. (S. C.) 638.

⁴ *Shepardson v. Perkins*, 58 N. H. 354.

⁵ *Arkwright v. Gell*, 5 M. & W. 203; *Gaved v. Martyn*, 19 C. B. n. s. 732.

⁶ *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Staffordshire Canal Co. v. Birmingham Canal Co.*, 11 Jur. n. s. 71. A river does not become a "canal" when its navigation is improved by artificial means. *People v. Kankakee River Improvement Co.*, 103 Ill. 491.

CHAPTER VII.

APPROPRIATION AND RIGHTS ACQUIRED BY PRIORITY.

SECTION.

- 226. Effect of prior occupancy.
- 227. This right under the mill acts of certain States.
- 228. Appropriations of water rights valid in the far West.
- 229. The extent of the right acquired by priority.
- 230. Such right not dependent upon title to the soil.
- 231. As against subsequent locators it is fixed by the original appropriation.
- 232. Duty to so keep ditch in repair that adjoining lands are not overflowed or injured thereby.
- 233. The right acquired by priority, how affected by the purpose for which the appropriation is made.
- 234. Sales of water rights.
- 235, 236. What constitutes an appropriation.
- 237. Effect of change in the use of the appropriated water.
- 238, 239. Prior right how lost.
- 240. The Act of Congress of July 26, 1866.

§ 226. At common law, the right of every riparian proprietor to the use of the stream is an incident to the ownership of the land bordering upon the stream, and arises *ex jure naturae*.¹ The right exists whether it is exercised or not, and the riparian proprietor may begin to exercise it when he will.² It does not depend upon occupancy, and is not limited by the prior occupation of others not amounting to an adverse enjoyment by prescription;³ but, the rights of the different proprietors being equal, and each being entitled to the reasonable use of the stream for any lawful

¹ *Ante*, §§ 204-209.

² *Ibid.*

³ *Ibid.*

purpose, it is wholly immaterial who is first in time. The amount of damages to which one proprietor is entitled for a wrongful interference with his riparian rights may, indeed, vary, according to the use to which he has applied the water, and the expenditure which he has made to render it available. If he has lawfully appropriated the water to a beneficial use, he may sue for an injury done to him in respect to such use; and if he has appropriated the stream to the use of a mill newly erected, he may recover from another proprietor upon the stream damages for the injury to his mill occasioned by the wrongful use of the stream, although before the mill was built the wrongdoer might have been liable to nominal damages only.¹ This relates, however, to an unlawful interference with an existing right, and has no bearing upon the question whether the use of the stream complained of is or is not lawful.

§ 227. The equal right of all the proprietors to the use of the stream in common, being thus an incident to the ownership of the land, and existing *jure naturae*, cannot be affected by such priority of occupation as does not amount to an adverse prescriptive right.² In Massachusetts and some other States there is an important limitation to the rule that no superior right to the stream is acquired by mere occupancy, and the owner of land who first erects a dam for the purpose

¹ Ibid.; *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; *Holker v. Porritt*, L. R. 10 Ex. 59, 62; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, 773; *Attorney General v. Birmingham*, 4 De Gex & J. 528; *Rutland v. Bowler*, *Palmer*, 290.

² *Mason v. Hill*, 5 B. & Ad. 1; 3 B. & Ad. 304; 2 Nev. & M. 747; *Wright v. Howard*, 1 Sim. & Stu. 190; *Sampson v. Hoddinott*, 1 C. B. N. s. 611; *Cocker v. Cowper*, 5 Tyrw. 103; *Chasemore v. Richards*, 2 H. & N. 181; *Holker v. Porritt*, L. R. 10 Ex. 59; *Platt v. Johnson*, 15 Johns. 213; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Palmer v. Mulligan*, 3 Caines, 397; *Campbell v. Smith*, 3 Hal. (N. J.) 140; *Pillsbury v. Moore*, 4 Maine, 154; *Gould v. Boston Duck Co.*, 13 Gray, 450; *Pugh v. Wheeler*, 2 Dev. & Bat. 50. The earlier authorities are to the contrary effect, upon the theory of the civil law, that flowing water belongs to no one, and that the right to use it depends upon possession. *Williams v. Morland*, 2 B. & C. 910; *Bealy v. Shaw*, 6 East, 208; *Saunders v. Newman*, 2 B. & Ald. 258; *Cox v. Mathews*, 1 Vent. 137; *Liggins v. Inge*, 7 Bing. 692; *Frankum v. Falmonth*, 6 C. & P. 520.

of operating a mill upon his own land, has the right to maintain it as against proprietors above and below,¹ although it may set the water back to such a distance and height as to prevent a proprietor above from having a sufficient fall to carry a mill upon his own land, or preclude any subsequent erection below him.² "To the extent," says Bigelow, C. J.,³ "to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose of carrying mills, the right of other owners on the same stream, who have not improved their sites for the creation of water-power and the driving of mills, is abridged and taken away. In such case prior occupancy gives priority of title. Although the right to the use of water is inherent in or appurtenant to land, it is nevertheless in a certain sense a right *publici juris*, and subject to the rule of law, which regards the erection of a dam for the purpose of creating mill power a profitable, beneficial and reasonable use of the stream, of which riparian proprietors on the same stream, who have not appropriated the force and fall of the water on their own land, cannot complain. It is *damnum absque injuria*." This limitation appears to be peculiar to a few States only, and it is quite generally held in the other States that the right to use the stream for the creation of a water power is, as in other cases, merely the right to use it in a reasonable manner and to a reasonable extent without

¹ Hatch v. Dwight, 17 Mass. 296; Cary v. Daniels, 8 Met. 476; Whitney v. James, 11 Met. 519; Gould v. Boston Duck Co., 13 Gray, 451; Fuller v. Chicopee Manuf. Co., 16 Gray, 44; Pratt v. Lamson, 2 Allen, 288; Smith v. Agawam Canal Co., Id. 357; Hapgood v. Brown, 102 Mass. 451; Lowell v. Boston, 111 Mass. 465; Wood v. Edes, 2 Allen, 573. In Storm v. Manchaug Co., 13 Allen, 10, 15, Hoar, J., says that the question when the right secured by prior occupancy begins, has always been determined by the express language of the mill acts. The same rule seems to prevail in Maine and Kentucky. Lincoln v.

Chadbourne, 56 Maine, 197; Heath v. Williams, 25 Maine, 44, 209; Bailey v. Rust, 15 Maine, 440; Tinkham v. Arnold, 3 Maine, 120; Butman v. Hussey, 12 Maine, 407; Tye v. Catching, 78 Ky. 463.

² Cary v. Daniels, 8 Met. 466; Pratt v. Lamson, 2 Allen, 288; Wentworth v. Poor, 38 Maine, 243; Fuller v. Chicopee Manuf. Co., 16 Gray, 44; Lincoln v. Chadbourne, 56 Maine, 197; Gould v. Boston Duck Co., 13 Gray, 451.

³ Fuller v. Chicopee Manuf. Co., 16 Gray, 43, 44.

regard to the question of priority.¹ Even in Massachusetts no riparian proprietor has a right unreasonably to divert the water or change the use of it, otherwise than in the above manner, to the injury of other proprietors upon the stream, unless such right has been acquired by grant or prescription;² and the right which a mill-owner acquires by prior occupation, "is not so absolute," says Merrick, J.,³ "as to give him the control of the whole stream, or to deprive other proprietors of the reasonable enjoyment of the privileges to which they are naturally entitled. They may still construct and maintain dams across the stream at any point either above or below his mill, for the purpose of raising a head of water to propel, operate, and work mills of their own, erected on the adjoining land, provided that their arrangements are so made that they will not unreasonably withhold and detain the water above, nor throw it back from below, so as to affect, impede, delay, or obstruct the movement and operation of the wheels and machinery of his previously existing mill."

§ 228. In California, Nevada, and other Pacific States and Territories, the common-law rule upon this subject is modified, owing to the peculiar condition of the settlers and

¹ *Keeney Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576, 582; *Parker v. Hotchkiss*, 25 Conn. 321; *King v. Tiffany*, 9 Conn. 162; *Tucker v. Jewett*, 11 Conn. 324; *Roath v. Driscoll*, 20 Conn. 541; *Tyler v. Wilkinson*, 4 Mason, 307; *Whipple v. Cumberland Manuf. Co.*, 2 Story, 661; *Gilman v. Tilton*, 5 N. H. 231; *Odiorne v. Lyford*, 9 N. H. 502; *Cowles v. Kidder*, 24 N. H. 378; *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 106; *Snow v. Parsons*, 28 Vt. 463; *Dumont v. Kellogg*, 29 Mich. 422; *Ryerson v. Brown*, 35 Mich. 333; *Timm v. Bear*, 29 Wis. 254; *Stout v. McAdams*, 2 Scam. 67; *Wilcoxon v. McGee*, 12 Ill. 381; *Bliss v. Kennedy*, 43 Ill. 67; *Rudd v. Williams*, 43 Ill. 385; *Hendrick v. Cook*, 4 Ga. 241; *Pool v. Lewis*, 41 Ga. 162; *Beavers v. Trimmer*, 25 N. J. L. 97;

Hartzall v. Sill, 12 Penn. St. 248; *Baldwin v. Calkins*, 10 Wend. 167; *Platt v. Johnson*, 15 Johns. 213; *Martin v. Bigelow*, 2 Aik. (Vt.) 184; *Johns v. Stevens*, 3 Vt. 308; *Davis v. Fuller*, 12 Vt. 178; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *Hoy v. Sterrett*, 2 Watts, 327; *McCalmont v. Whitaker*, 3 Rawle, 84; *Strickler v. Todd*, 10 S. & R. 63; *Whaler v. Ahl*, 29 Penn. St. 98.

² *Cowell v. Thayer*, 5 Met. 253, 256; *Boliver Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Williams v. Nelson*, 23 Pick. 141; *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 191.

³ *Smith v. Agawam Canal Co.*, 2 Allen, 355, 357; *Dean v. Colt*, 99 Mass. 486; *Gleason v. Assabet Manuf. Co.*, 101 Mass. 72; *Thurber v. Martin*, 2 Gray, 394.

miners upon the public lands; and the right to running water exists without private ownership of the soil, upon the ground of prior location upon the land or prior appropriation of the water. When there is no private ownership of the soil, the rights acquired by such priority are as perfect and absolute as if acquired by prescription or by an express grant from riparian proprietors.¹ "The reasons," says Sanderson, C. J.,² "which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non laedas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel — *ubi currere solebat* — without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners,

¹ *Kidd v. Laird*, 15 Cal. 161; *Butte T. M. Co. v. Morgan*, 19 Cal. 609.

² *Hill v. Smith*, 27 Cal. 476, 482. In *Atchison v. Peterson*, 20 Wall. 507, 512, Field, J., after referring to the common-law rule by which the different riparian proprietors have an equal right to use the water of the stream, said: "This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its

silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale, and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned, upon which the rule is founded, is equally as applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes." The remainder of this chapter is devoted to the rules which are applicable in the States above referred to, and are peculiar to them.

§ 229. As between persons who claim the water of a stream flowing through the public land, merely by the prior appropriation of the water itself, or by a prior location upon the land, he has the best right who is first in time.¹ The first appropriator is entitled to use and enjoy the water to the full extent of his original appropriation, even when this includes all the water of the stream, to have its quality unimpaired so as not to defeat the purpose of such appropriation, and to remove obstructions from the natural channel.² He may apply it to any beneficial purpose, without any obligation to

¹ *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *Ortman v. Dixon*, 13 Cal. 38; *McDonald v. Bear River Mining Co.*, 15 Cal. 145; 13 Cal. 220; *Hoffman v. Stone*, 7 Cal. 49; *Irwin v. Phillips*, 5 Cal. 140; *Sims v. Smith*, 7 Cal. 148; *Marius v. Bicknell*, 10 Cal. 217; *Hill v. Newman*, 5 Cal. 445; *Leigh Co. v. Independent Co.*, 8 Cal. 323; *Sullivan v. Beardsley*, 55 Cal. 608; *Atchison v. Peterson*, 20 Wall. 507; 1 Mon. 561; *Basey v. Gallagher*, Id. 670; 1 Mon. 455; *Stafford v. Hornbuckle*, 3 Mon. 485; *Lobdell v. Simpson*, 2 Nev. 274;

Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534; *James v. Goodenough*, 7 Nev. 324; *Dalton v. Bowker*, 8 Nev. 190; *Schilling v. Rominger*, 4 Col. 100; *Thorp v. Woolman*, 1 Mon. 168.

² *Ibid.*; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 543; *Barnes v. Sabron*, 10 Nev. 217; *Nevada Water Co. v. Powell*, 34 Cal. 109; *Gale v. Tuolumne Water Co.*, 14 Cal. 25; *Sims v. Smith*, 7 Cal. 148.

return it to the stream from which it was taken, or to preserve its purity or quantity.¹ He is equally entitled to have his right unimpaired by subsequent locators above as well as below him,² and may peacefully abate an obstruction in the stream which interferes with his superior claim, even when by statute an abatement is authorized by legal remedies.³ Percolating water cannot be permanently appropriated, and the owner of land on which a spring is situated may so use his land as to cut off the water from an irrigating ditch which is supplied from the spring.⁴ Subsequent appropriators do not acquire any right to the waters of springs which have been previously appropriated, and which constitute the source of a creek, from the fact that the means by which the waters reach the creek are subterranean and not well understood.⁵

§ 230. The right to thus appropriate water exists without private ownership in the soil as against all persons but the government or its grantees.⁶ Possession of public land which has not been surveyed or patented gives rise to no riparian rights in the streams which flow through it.⁷ If the water of a stream on the public land is appropriated and the land is afterwards patented, the patentee succeeds, in the absence of statute,⁸ to the right of the government, unencumbered by the previous appropriation, and as no prescription runs against the government, it is immaterial how long the water may have been appropriated and used in a particular manner prior to the issue of the patent.⁹ The first appropriator is only required to prove his priority in an action

¹ *Union Mill Co. v. Ferris*, 2 Sawyer, 184; *Hill v. Smith*, 32 Cal. 166; *Bear River Co. v. York Mining Co.*, 8 Cal. 327; *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185.

² *Hill v. King*, 8 Cal. 336.

³ *Stiles v. Davis*, 5 Cal. 120; *Butts T. M. Co. v. Morgan*, 19 Cal. 609.

⁴ *Hanson v. McCue*, 42 Cal. 304.

⁵ *Strait v. Brown*, 16 Nev. 317.

⁶ *Hill v. Newman*, 5 Cal. 445; *Van-*

sickle v. Haines, 7 Nev. 249; *Parks v. Barkley*, 1 Mon. 514.

⁷ *Ibid.*; *Lake v. Tolles*, 8 Nev. 285; *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44. But see *Crandall v. Woode*, 8 Cal. 136.

⁸ See *post*, § 240.

⁹ *Ibid.*; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Vansickle v. Haines*, 7 Nev. 249; *Pope v. Kinman*, 54 Cal. 3.

against one who simply denies that he is first in time.¹ The defendant, if he has no patent, cannot defeat the action by proof of the paramount title of the government;² and if a prior claim to the water exists in a third person, this fact, to be available in defence, must be pleaded specially.³

§ 231. The right of the first appropriator is fixed by his appropriation, and when others locate upon the stream or appropriate the water, he cannot enlarge his original appropriation or make any change in the channel to their injury.⁴ Each subsequent locator or appropriator is entitled to have the water flow in the same manner as when he located, and may insist that the prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.⁵ If a portion of the water is appropriated only for certain days, others may not only appropriate the surplus in whole or in part, but may use the quantity of water first appropriated, at such times as it is not used or needed by the first appropriator.⁶

¹ *Coryell v. Cain*, 16 Cal. 567.

² *Ibid.*

³ *Humphreys v. McCall*, 9 Cal. 59; *Bird v. Lisbros*, *Id.* 1.

⁴ *Lobdell v. Simpson*, 2 Nev. 274; *Proctor v. Jennings*, 6 Nev. 83; *Barnes v. Sabron*, 10 Nev. 217; *American Co. v. Bradford*, 27 Cal. 360; *Nevada Water Power Co. v. Powell*, 34 Cal. 109; *Higgins v. Barker*, 42 Cal. 233.

⁵ *Ibid.* See *post*, § 236.

⁶ *McKinney v. Smith*, 21 Cal. 374; *Smith v. O'Hara*, 43 Cal. 371; *Barnes v. Sabron*, 10 Nev. 217. Where one tenant in common receives all the rents and profits from the business of a ditch or mine, his co-tenant may maintain an action at law against him to recover his share. *Abel v. Love*, 17 Cal. 233. If one joint owner of a flume used for mining purposes consents to the opening of a ditch above, the water from which injures the flume, damages cannot be recovered for such injury by the other joint

owner. *Crary v. Campbell*, 24 Cal. 634. The water flowing in a ditch owned by tenants in common cannot be partitioned, but, in case of dispute as to their respective rights, a sale and distribution of the proceeds may be ordered by the court. *McGillivray v. Evans*, 27 Cal. 92. Where a ditch for mining purposes is owned by several proprietors, and their relation is not otherwise defined, they are to be regarded as tenants in common of real estate, and their rights are determined by the rules of law applicable to such tenants. *Bradley v. Harkness*, 26 Cal. 69; *Jones v. Parsons*, 25 Cal. 100; *Reed v. Spicer*, 27 Cal. 63; *Parke v. Kilham*, 8 Cal. 77. Their relation has some of the incidents of a partnership. *Goodenow v. Ewer*, 16 Cal. 461; *Jones v. Parsons*, 25 Cal. 100; *Duryea v. Burt*, 28 Cal. 569; *Dougherty v. Creary*, 30 Cal. 290; *Chase v. Steell*, 9 Cal. 66; *Bradley v. Harkness*, 26 Cal. 69. When necessary, a

The right of the first appropriator is not determined by a comparison of the value of the water to him and to subsequent locators;¹ but if he is entitled to all the water of the stream at the point where his ditch starts, others cannot complain if it is enlarged.² When the prior appropriation is for a particular purpose, as for running a mill, it does not include all the water at that point, when there is more than is sufficient for that purpose, but only so much as is actually needed; and the appropriator cannot afterwards extend his appropriation to include more water to the detriment of those who have meanwhile appropriated the surplus,³ or maintain an action against subsequent claimants whose acts do not impair his use and enjoyment of the water for the original purpose intended.⁴ Even when physical and unanticipated changes occur in the stream, whether from natural or artificial causes, one who, by means of a dam and ditch, has first diverted a portion of the water of a stream sufficient for his purpose according to the condition of the stream at the time, is not entitled to raise the height of his dam in order to continue the diversion through the ditch and thereby interfere with the rights of subsequent locators whose acts have not caused the change.⁵ The extent of the original appropriation, and the extent to which subsequent acts of appropriation are subordinate to it, are questions of fact for the jury;⁶ but if there is no evidence of a more extended right, and the quantity originally appropriated was sufficient for the purpose designed, the use made of the water for a term of years affords a proper test.⁷ A temporary or trivial impairment

majority of them may determine the modes of carrying on the business. *Dougherty v. Creary*, 30 Cal. 290. But no authority is conferred upon one member to bind the company by his contract. *McConnell v. Denver*, 35 Cal. 365. One partner does not forfeit his rights in the common property by failing to pay his proportion of the expenses. *Kimball v. Gearhart*, 12 Cal. 27.

¹ *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Fabian v. Collins*, 2 Mon. 510.

² *James v. Williams*, 31 Cal. 211.

³ *Ortman v. Dixon*, 13 Cal. 33; *McKinney v. Smith*, 21 Cal. 374; *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, Id. 607; *Kelly v. Natoma Co.*, 6 Cal. 105.

⁴ *Hill v. Smith*, 27 Cal. 476.

⁵ *Nevada Water Co. v. Powell*, 34 Cal. 109.

⁶ *Ibid.*

⁷ *Ibid.*; *Ortman v. Dixon*, 13 Cal.

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of the regularity of the flow of the stream, or of the purity of the water, which does not cause actual injury to the prior claimant, does not give him a cause of action.¹

§ 232. When water is conducted through an artificial ditch over another's land, the ditch owner is bound to keep it in repair, so that the water will not pass the banks and injure the lands of others by washing away the soil or covering it with sand;² and it is not material who had the prior right or title.³ If he uses a ravine or natural watercourse as part of his ditch, he is not responsible for injuries done by the natural waters thereof, but only for such overflow as is caused by his use of the watercourse as part of his ditch.⁴ The owner of a ditch or flume who erects a dam above mining claims, which are afterwards damaged by the breaking of the dam, is not liable for the injury, if the dam was constructed with reasonable skill, and no negligence is shown in its repair or management,⁵ or if it is wholly in charge of a contractor.⁶ So if a ditch is injured without fault on the owner's part, as by burrowing animals or falling trees, he is not liable to subsequent appropriators or locators of adjoining claims which are injured by the breaking of the ditch.⁷ If an artificial ditch is constructed across a natural watercourse, which it dams up, and which in a time of flood renders it necessary to cut the embankment of the ditch to preserve it from injury, the owner of the ditch is guilty of negligence if he cuts the embankment at a point

¹ *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Natoma Water Co. v. McCoy*, Id. 490; *Bear River Co. v. New York Mining Co.*, 8 Cal. 327; *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

² *Richardson v. Kier*, 34 Cal. 63; 37 Cal. 263; *Wolf v. St. Louis Water Co.*, 10 Cal. 541; *Robinson v. Black Diamond Coal Co.*, 50 Cal. 460; *Darst v. Rush*, 14 Cal. 81; *Campbell v. Bear River Co.*, 35 Cal. 679; *Mathews v. Kinsell*, 41 Cal. 512.

³ *Ibid.* The plaintiff's right to damages is not affected by the fact that he

was present and could have prevented the injury by committing a trespass. *Wolfe v. St. Louis*, 15 Cal. 319; 10 Cal. 541.

⁴ *Ibid.*

⁵ *Everett v. Hydraulic Co.*, 23 Cal. 225; *Fraler v. Sears Union Water Co.*, 12 Cal. 555; *Tuolumne County Co. v. Columbia Water Co.*, 10 Cal. 194; *Todd v. Cochell*, 17 Cal. 97.

⁶ *Boswell v. Laird*, 8 Cal. 469.

⁷ *Tenney v. Miners' Ditch Co.*, 7 Cal. 335.

where there is no natural watercourse, thereby turning the water upon cultivated lands, and cannot claim that the injury results from the act of God.¹

§ 233. Whether the appropriation is for mining, for mill purposes, or for irrigation, the rights thereby acquired stand upon the same footing, and an appropriation or use of the water for one of these purposes is not justifiable when it interferes with a prior appropriation or location for another purpose.² The prior possessory rights of settlers on the public lands for agricultural and grazing purposes yield to the rights of miners to enter and extract the precious metals, but this does not authorize the miner to dig ditches and conduct or flow water over the land of the agriculturalist without his consent.³ The prior owner of the right of way for a ditch cannot be lawfully deprived thereof by the decree of a court of equity authorizing the ditch to be washed away by miners upon condition that a suitable aqueduct be built in its place.⁴ If the appropriation is for mining purposes and there are orchards or gardens below on the stream, the appropriated water must be so used as not to

¹ *Turner v. Tuolumne Water Co.*, 25 Cal. 397. The doctrine of lateral support does not apply to "deep diggings" worked by the hydraulic process, where the very purpose of locating the ground is to tear down and wash away the gravel of the located claims. *Hendricks v. Spring Valley Mining Co.*, 58 Cal. 190. Where a lease contained a covenant to keep the demised premises in repair, "damages by the elements or acts of Providence excepted," and near by was a reservoir sufficiently protected by an embankment, which was so injured by strangers that it gave way and the water rushed upon the demised premises, the injury was held not to be within the exception. *Polask v. Pioche*, 35 Cal. 416.

² *McDonald v. Bear River Co.*, 13

Cal. 220; 15 Cal. 145; *Tarter v. Spring Creek Co.*, 5 Cal. 395; *Ramsay v. Chandler*, 3 Cal. 90; *Leigh v. Independent Ditch Co.*, 8 Cal. 328; *Hill v. Smith*, 27 Cal. 476; *Ortman v. Dixon*, 13 Cal. 34; *Gipson v. Puchta*, 33 Cal. 310; *Basey v. Gallagher*, 20 Wall. 682; *Jennison v. Kirk*, 98 U. S. 453.

³ *Stokes v. Barrett*, 5 Cal. 36; *Tarter v. Spring Creek Co.*, 5 Cal. 395; *Burdge v. Underwood*, 6 Cal. 45; *Conger v. Weaver*, 6 Cal. 548; *Weimer v. Lowery*, 11 Cal. 104; *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, Id. 460; *Gold Hill Mining Co. v. Ish*, 5 Oregon, 104; *Gillan v. Hutchinson*, 16 Cal. 153; *Rogers v. Soogs*, 22 Cal. 444; *Esminge v. McIntire*, 23 Cal. 593; *Courtwright v. Bear River Co.*, 30 Cal. 573.

⁴ *Gregory v. Nelson*, 41 Cal. 278.

injure the trees or gardens;¹ and if a reservoir is constructed across a stream or ravine for the purpose of irrigating a garden, the water cannot be lawfully diverted therefrom, or the reservoir filled with mud and washings, by persons who afterwards enter for mining purposes.² So, upon the other hand, the prior right of a person who has diverted the water in a ditch for mining purposes cannot be lawfully impaired by the discharge of refuse from a mill subsequently located on the stream.³ The first locator of a mining claim in the bed of a stream is not entitled to use the channel below as an outlet for tailings to the material injury of other mining claims subsequently located there, but each person mining in the stream is entitled to use, in a proper and reasonable manner, both the channel and water of the stream, and an injury to subsequent locators is *damnum absque injuria*, if caused by works which are conducted with reasonable care.⁴ So, if the construction of dams for the purpose of working mining claims in the bed of a canyon is authorized by local customs, damage occasioned by such structures, by flooding the mining claim of a subsequent locator on the banks of the canyon, is *damnum absque injuria*.⁵ The rights of ditch owners against those who work subterranean mines, which cause the bed of the ditch to settle and crack or drain off the water, are governed by the maxim *sic utere tuo ut alienum non laedas* rather than by any consideration of priority.⁶

§ 234. The right to water acquired by priority is the subject of property, and may be sold and conveyed; but the transfer of a water claim does not pass a right of action for damages for a previous illegal use of the water.⁷ If the

¹ Wixon v. B. Water Co., 24 Cal. 367; Robinson v. Black Diamond Coal Co., 50 Cal. 460.

² Rupley v. Welch, 23 Cal. 452; Levaroni v. Miller, 34 Cal. 231.

³ Phoenix Water Co. v. Fletcher, 23 Cal. 481; Natoma Water Co. v. McCoy, Id. 490.

⁴ Esmond v. Chew, 15 Cal. 137; Logan v. Driscoll, 19 Cal. 623; Gregory

v. Harris, 43 Cal. 38; Nelson v. O'Neal, 1 Mon. 284; Lincoln v. Rogers, Id. 217.

⁵ Stone v. Bumpus, 46 Cal. 218; 40 Cal. 428.

⁶ Clark v. Willet, 35 Cal. 534; Cole Silver Mining Co. v. Virginia Water Co., 1 Sawyer, 470.

⁷ Kimball v. Gearhart, 12 Cal. 27.

water is appropriated for a mill, and this is sold together with the possessory right of land on the stream, the vendee becomes the owner of the water right.¹ A person who sells his interest in the water of a stream, to be used in a ditch above him, does not lose his prior right over a subsequent appropriator below to any flow remaining.² If a ditch or flume in process of construction be mortgaged, the mortgage will, if such appears to be the intent, include the whole work when completed, and improvements afterwards put thereon, like a mortgage of real estate.³ The ditch when completed is not a mere easement or appurtenance.⁴ One ditch cannot be appurtenant to another ditch and pass by grant as an incident, although it may pass as part and parcel of the subject matter.⁵ It can only be sold by deed.⁶ If possession is taken by the vendee under a verbal sale, his right to the water dates from the time of his entry into possession, and not from that of the vendor's appropriation.⁷ The vendor's attempt to convey by an imperfect deed operates as an abandonment of his prior appropriation.⁸ General words granting a ditch convey the channel, the right to the water by which it is supplied, and the ditches which convey the water to it.⁹ In Colorado, the right of way over others' lands in order to obtain water for irrigation appears to result from necessity and the peculiarity of the climate, and to exist independently of statute.¹⁰

¹ McDonald v. Bear River Co., 13 Cal. 220; 15 Cal. 145.

² McDonald v. Askew, 29 Cal. 200.

³ Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

⁴ Reed v. Spicer, 27 Cal. 57; Clark v. Willett, 35 Cal. 534; Hart v. Plum, 14 Cal. 148; Merritt v. Judd, 14 Cal. 59.

⁵ Donnell v. Humphreys, 1 Mon. 518; Quirk v. Falk, 47 Cal. 453. See Hungarian Hill Mining Co. v. Moses, 58 Cal. 168.

⁶ Bradley v. Harkness, 26 Cal. 69; Smith v. O'Hara, 43 Cal. 371; Barkley v. Tieleke, 2 Mon. 59; Fabian v. Collins, 3 Mon. 215; Hill v. Newman, 5 Cal. 445. If a ditch extending for

several miles is constructed by one person and sold in sections, the purchaser of a lower section does not for all purposes have a legal interest in the water flowing into the ditch at its head. South Ford Canal Co. v. Gordon, 6 Wall. 501; Reynolds v. Hosmer, 51 Cal. 205. An Indian may, it seems, maintain an action for the diversion of water which he appropriated, and others may succeed to his rights. Lobdell v. Hall, 3 Nev. 507.

⁷ Ibid.

⁸ Barkley v. Tieleke, 2 Mon. 59.

⁹ Ellison v. Jackson, 12 Cal. 542.

¹⁰ Yunker v. Nichols, 1 Col. 551; Schilling v. Rominger, 4 Col. 100.

§ 235. The right to divert water flowing through the public land, so far as it depends upon priority and not upon the ownership of the adjoining land, can only be acquired by actual appropriation.¹ Such appropriation cannot be constructive,² and must be made with the intention of devoting the water to some useful purpose.³ A notice of intention to appropriate the water is not of itself sufficient evidence of possession, although, in connection with other acts, it may be sufficient.⁴ An appropriation of riparian land for a mill-site is not made by digging a ditch on public land, and such an appropriation is not an appropriation of water for the use of the mill.⁵ Where notice was posted, upon a tree on the bank of a river, of the appropriation of a water right to commence at that point, and of a right of way for a ditch of a certain capacity to a bend in the river below, and this was followed within the space of six months by certain work on the ditch which was insufficient to make it of practical use, and by the erection of a monument at a suitable point for a mill-site below the bend of the river, it was held that there was not such a possession of the land traversed by the ditch or of the mill-site as to avail against an entry and appropriation of them made about eleven months after the posting of the notice.⁶ So, the mere digging of a ditch for the purpose of drainage,⁷ or claiming the water for speculation,⁸ does not give priority over those who construct ditches for the purpose of taking the water and applying it to a beneficial use.

¹ *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Twist v. Union Canal Co.*, 6 Cal. 170; *Eddy v. Simpson*, 3 Cal. 249; *Conger v. Weaver*, 6 Cal. 548; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

² *Ibid.*; *Coryell v. Cain*, 16 Cal. 567; *Kelley v. Natoma Water Co.*, 6 Cal. 105.

³ *Maeris v. Bicknell*, 7 Cal. 261; *Davis v. Gale*, 32 Cal. 26.

⁴ *Thompson v. Lee*, 8 Cal. 275; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Kimball v. Gearhart*, 12 Cal. 27;

Jones v. Jackson, 9 Cal. 237; *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44; *Columbia Mining Co. v. Holter*, 1 Mon. 296.

⁵ *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44; *Nevada County Canal Co. v. Kidd*, 37 Cal. 282.

⁶ *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44.

⁷ *Maeris v. Bicknell*, 7 Cal. 261; *McKinney v. Smith*, 21 Cal. 374.

⁸ *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Dick v. Caldwell*, 14 Nev. 167.

§ 236. The notice of intention to appropriate water must be sufficient to put a prudent man on inquiry;¹ but such notices are liberally construed.² If, after notice given, a ditch is begun in good faith, the enjoyment does not commence until its completion, but, as against others, the right dates by relation from the commencement of the work, and the law allows a reasonable time for completing the appropriation.³ No unusual or extraordinary exertions are necessary in prosecuting the work, but it must be carried forward with diligence.⁴ It is a question of fact for the jury whether there has been due diligence,⁵ the nature of the climate and the soil, the difficulty of obtaining labor, tools, or materials, and the size and extent of the work being proper subjects for their consideration.⁶ If the work is not prosecuted diligently, the right to use the water dates from the time when the appropriation is perfected, and does not relate back to the time when the first step to secure it was taken.⁷ The same is true if the first acts, from which the appropriator seeks to date his right, do not indicate an intention to appropriate the water.⁸ If there is great delay in the work, it is not excused by matters which do not relate directly to the enterprise, such as the illness of the appropriator or his lack of means.⁹ If the water is diverted with due diligence, for the purpose of irrigation, the rights of the appropriator are not necessarily limited to the amount of water actually used during the first or second year of the appropriation, or regulated by the number of acres then cultivated, but the object in view at the time when the water was first diverted is to be considered in connection

¹ Yale on Mining Claims, 78; Hess v. Winder, 30 Cal. 349; McKinney v. Smith, 21 Cal. 374; North Noonday Mining Co. v. Orient Mining Co., 6 Sawyer, 299, 503.

² Osgood v. Eldorado Water Co., 56 Cal. 571.

³ Ibid.; Kelly v. Natoma Water Co., 6 Cal. 105; Macris v. Bicknell, 7 Cal. 261; King v. Edwards, 1 Mon. 235; Woolman v. Garringer, 1 Mon. 535; Atchison v. Peterson, 1 Mon. 561.

⁴ Ibid.; Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534; Parke v. Kilham, 8 Cal. 77.

⁵ Weaver v. Eureka Lake Co., 15 Cal. 271.

⁶ Kimball v. Gearhart, 12 Cal. 27.

⁷ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534.

⁸ Kimball v. Gearhart, 12 Cal. 27.

⁹ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534.

with the appropriation actually made.¹ The quantity of water acquired by the appropriation would appear to be measured by the capacity of the ditch or flume, when fully completed, at its smallest point.² But if the general size and capacity of the ditch indicate that more water is to be used than is turned into it at first, a reasonable time is to be allowed to remove obstructions or change the grade in order that the ditch may be filled to its proper capacity.³ The owner of the ditch or flume has the exclusive and absolute control of the water therein, although it does not appear to have been decided whether for all purposes such water is to be regarded as his private property.⁴ When collected in reservoirs or pipes, and separated from the source of supply, the water is personal property, like harvested ice or gas in pipes.⁵ While the claimant's dam and canal are in process of construction, or so much out of repair that they are not available for the purpose designed,⁶ and until they are in a condition to appropriate the water, the use of the water by others is not an injury to him, and such use affords him no ground for relief, legal or equitable.⁷ But the prior claimant has the right to use so much of the water as is necessary to preserve his flume from injury while in the process of construction.⁸ A diversion of water which is both wrongful and continuous may be restrained upon a bill in equity for an injunction,⁹ but the remedy for the past diversion of a watercourse,¹⁰ or for a diversion which is not continuing, or

¹ *Barnes v. Sabron*, 10 Nev. 217; *White v. Todd's Valley Co.*, 8 Cal. 443.

² *Ophir Silver Mining Co. v. Carpenter*, 6 Nev. 393; *Barnes v. Sabron*, 10 Nev. 217; *Caruthers v. Pemberton*, 1 Mon. 111.

³ *White v. Todd's Water Co.*, 8 Cal. 443; *Dougherty v. Haggin*, 56 Cal. 522.

⁴ *Kidd v. Laird*, 15 Cal. 161.

⁵ *Heyneman v. Blake*, 19 Cal. 579; *Parks Canal Co. v. Hoyt*, 57 Cal. 44.

⁶ *Bear River Co. v. Boles*, 24 Cal. 359; *Brown v. Smith*, 10 Cal. 508.

⁷ *Nevada County Canal Co. v. Kidd*, 37 Cal. 282; *Harvey v. Chilton*, 11 Cal. 114; *Union Water Co. v. Crary*, 25 Cal. 504.

⁸ *Weaver v. Conger*, 10 Cal. 233; 6 Cal. 548.

⁹ *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Stein Canal Co. v. Kern Island Irrigating Canal Co.*, 53 Cal. 563; *Harris v. Shoutz*, 1 Mon. 212; *Fabian v. Collins*, 3 Mon. 215.

¹⁰ *Ibid.*

threatened or likely to continue,¹ is in a court of law only. Every continuance of a wrongful diversion gives a new cause of action,² and a recovery in one action, in which the plaintiff alleges that he is entitled to a certain quantity of water, is not *res adjudicata* upon the question of quantity.³ The gravamen of the action is the diversion of the water, and different counts are not necessary when the diversion is accomplished by different means.⁴

§ 237. When water has been lawfully appropriated, the priority thereby acquired is not lost by changing the use to which it was first applied or the place at which it was first employed.⁵ If the original appropriation was for a saw-mill, the water may be used for a grist-mill subsequently erected.⁶ If the water was appropriated for a mining claim, which is worked out and abandoned, the owner may extend his ditch and use the same quantity of water at other points or for a different purpose,⁷ or, ceasing to use it, he may hold it for sale.⁸ The miner may extend his flume on his own claim for the express purpose of preventing a subsequent appropriator below from constructing a ditch on that claim, even though the extension may not be for a useful purpose.⁹ But the mode of the appropriation or the point of diversion cannot be changed by the first appropriator so as to interfere with the rights acquired by subsequent appropriators.¹⁰

§ 238. The prior right to the use of the water may be lost by abandonment,¹¹ or by an adverse possession continued un-

¹ Coker v. Simpson, 7 Cal. 340; Tuolumne Co. v. Chapman, 8 Cal. 392.

² Toombs v. Hornbuckle, 3 Mon. 193.

³ McDonald v. Bear River Co., 13 Cal. 220; 15 Cal. 145.

⁴ Gale v. Tuolumne Water Co., 14 Cal. 25; Priest v. Union Canal Co., 6 Cal. 170.

⁵ Maeris v. Bicknell, 7 Cal. 261; Hill v. Smith, 27 Cal. 476; Davis v. Gale, 32 Cal. 23; Kidd v. Laird, 15 Cal. 161.

⁶ McDonald v. Bear River Co., 13 Cal. 220.

⁷ Davis v. Gale, 32 Cal. 26; Woolman v. Garringer, 1 Mon. 535.

⁸ Fabian v. Collins, 2 Mon. 510.

⁹ Correa v. Frietas, 42 Cal. 339; McKinney v. Smith, 21 Cal. 374.

¹⁰ Columbia Mining Co. v. Holter, 1 Mon. 296; Butte Mining Co. v. Morgan, 19 Cal. 609; ante, § 231.

¹¹ Davis v. Gale, 32 Cal. 26; Dodge v. Marden, 7 Oregon, 456.

interruptedly for the statutory period.¹ If by abandonment, the prior right is not revived in the grantee's favor by a sale of the same, though made in good faith;² if by adverse possession, the statute is not prevented from running against the prior appropriator by the fact that the possessor permits a portion of the water to flow down the stream for the accommodation of those using the water below.³ Appropriation of water does not give a right to the exclusive use of the bed of the stream; and if the stream is a mere torrent, dry at certain seasons of the year, it may be used when dry as part of a ditch to conduct artificial waters, and such use does not work an abandonment of the waters so conducted, although it gives no right to divert or use the natural water of the stream as against a prior locator.⁴ It is not an abandonment of artificial waters to mingle them with the water of a natural watercourse for the purpose of conducting them to the point where they are to be used, but they may be afterwards diverted, if in so doing the prior rights of others to the natural water of the stream are not impaired.⁵

§ 239. An appropriator of water who duly posts his notice, and, while prosecuting the work with diligence, afterwards posts a second notice of the appropriation of the same water, does not abandon his first claim.⁶ If water from a ditch supplied from one stream is emptied into another stream, and the owner does not intend to retake it, or if water lawfully diverted flows into the second stream by natural channels from the works of the appropriator, it becomes *publici juris*, and the appropriators of the waters of the

¹ Davis v. Gale, 32 Cal. 26; Partridge v. McKinney, 10 Cal. 181; Crandall v. Woods, 8 Cal. 136; American Co. v. Bradford, 27 Cal. 360; Union Water Co. v. Crary, 25 Cal. 504; Campbell v. West, 44 Cal. 646; Dick v. Bird, 14 Nev. 161.

² Davis v. Gale, 32 Cal. 26.

³ Davis v. Gale, 32 Cal. 26; Yankee Jim's Water Co. v. Crary, 25 Cal. 504. The fact that numerous persons use an irrigating ditch, constructed,

repaired, and controlled at private expense, and that their respective rights are not clearly defined, does not show a dedication to the public. Cate v. Sanford, 54 Cal. 24.

⁴ Hoffman v. Stone, 7 Cal. 46; Burnett v. Whitesides, 15 Cal. 35.

⁵ Butte Canal Co. v. Vaughn, 11 Cal. 143.

⁶ Osgood v. Eldorado Water Co., 53 Cal. 571.

stream which receives it are entitled to the increase according to priority.¹ The same is true when water is discharged into a stream as matter of convenience and without intention to reserve it.² In controversies of this character, the person who mingles the water belonging to him with that appropriated by others has the burden of proof to establish his right and the absence of intent to abandon.³ When the water and tailings passing away from a mining claim are abandoned, others may appropriate them, but cannot insist that the abandonment shall be continued for their benefit on the ground that they have incurred expense to secure the same.⁴ Tailings which are permitted to flow upon another's land belong to him, but a stranger is not entitled to take tailings merely because they flow in a mixed mass from different mining grounds.⁵

§ 240. Riparian proprietors who own the soil have the rights which attach to riparian ownership at common law, and each is entitled, as against his neighbors upon the stream, to the use of the water for the supply of natural wants, and to its reasonable enjoyment for manufacturing and other purposes.⁶ The United States, as proprietor of the public lands, has the same rights and property in the streams flowing through such lands that would be possessed by any riparian proprietor;⁷ and, in the absence of legislation by Congress limiting the effect of the grant, patents for public lands from the general government pass, together with the fee of the soil, and, as incident thereto, the benefit of all natural streams which flow through them.⁸ The patentee of land cannot acquire a prescriptive right to flow land

¹ *Davis v. Gale*, 32 Cal. 26; *Eddy v. Simpson*, 3 Cal. 249.

² *McKinney v. Smith*, 21 Cal. 374.

³ *Butte Canal Co. v. Vaughn*, 11 Cal. 143.

⁴ *Dougherty v. Creary*, 30 Cal. 290; *Woolman v. Garringer*, 1 Mon. 535. A possessory title to land may be acquired for the purpose of taking tailings deposited thereon. *Rogers v.*

Cooney, 7 Nev. 213. See *Wood v. Richardson*, 35 Cal. 149.

⁵ *Jones v. Jackson*, 9 Cal. 237.

⁶ *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Los Angeles v. Baldwin*, 53 Cal. 469; *Pope v. Kinman*, 54 Cal. 3; *Ferrea v. Knipe*, 28 Cal. 340; *ante*, c. 6.

⁷ *Ibid.*; *Vansickle v. Haines*, 7 Nev. 249.

⁸ *Ibid.*

above belonging to the United States, and the purchaser of the flooded land may sue for the injury at any time within the statutory period after the conveyance from the United States without regard to the length of time that the flowage may have continued while the land was owned by the government.¹ The priority secured by the ninth section of the important Act of Congress of July 26, 1866,² exists, although the three conditions named therein may not all be present in the particular case.³ A statute upon this subject, like others, is of higher authority than a custom, and prevails over it in case of conflict.⁴ Congress alone can control and dispose of the public lands in a Territory, but under the above act of Congress, and the amendatory acts of 1870⁵ and of 1872,⁶ the legislative assembly of a Territory, or miners, may establish laws or rules defining the extent of mining claims, and regulate the modes of developing and working them.⁷ The local customs mentioned

¹ *Matthews v. Ferrea*, 45 Cal. 51; *Ogburn v. Connor*, 46 Cal. 347; *Wilkins v. McClue*, 46 Cal. 656. Lands claimed are public lands of the United States until the claimant proves up his claim and pays for the land. *Farley v. Spring Valley Mining Co.*, 58 Cal. 142.

² This section provides that "when- ever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such in-

jury or damage shall be liable to the party injured for such injury or damage." 14 Stat. at Large, 253; U. S. Rev. Stats. § 2339; *Basey v. Gallagher*, 20 Wall. 670; *Atchison v. Peterson*, Id. 507; *Jennison v. Kirk*, 98 U. S. 453; *Mining Co. v. Tarbet*, Id. 463; *Thorp v. Freed*, 1 Mon. 651; *Gold Hill Mining Co. v. Ish*, 5 Oregon, 104. See Acts of Congress of July 9, 1870 (16 Stat. at Large, 217) and of May 10, 1872 (17 Stats. at Large, 91). This section is a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, rather than the establishment of a new one. *Miller, J.*, in *Broder v. Water Co.*, 101 U. S. 276; 50 Cal. 621; *Sparrow v. Strong*, 3 Wall. 97, 777.

³ *Basey v. Gallagher*, 20 Wall. 670; *Barnes v. Sabron*, 10 Nev. 217.

⁴ *Ibid.*

⁵ 16 Stats. at Large, 217.

⁶ 17 Stats. at Large, 91.

⁷ *Territory v. Lee*, 2 Mon. 124; *Orr v. Haskell*, Id. 225; *English v. Johnson*, 17 Cal. 107.

in the above act are not judicially noticed by the courts, so far as they create rights differing from those possessed by riparian proprietors at common law, but it is incumbent upon the party relying upon such a custom to allege and prove it.¹ Prior to the statute, rights acquired by appropriation, and supported by the customs, laws, or decisions of the State in which the land was situated, were enforced between occupants of the public land having no title to the soil,² and the effect of the statute is to preserve this priority against those who have received patents to the land since its enactment.³ The statute is prospective in its operation, and does not affect a patent issued before its passage,⁴ or a patent subsequently issued to a person who had paid for the land prior to the act, entered thereon and received a certificate of purchase, since the patent when issued relates to the date of the entry.⁵ It does not give rights of way not recognized by the customary law of the State or Territory, and the proviso to the ninth section conferred no additional rights upon the owners of ditches subsequently constructed, but simply rendered them liable to persons on the public domain whose possessions might be injured by such construction.⁶ The water rights sustained by this statute are rights belonging to real estate, and are not lost by a non-user, which does not amount to an abandonment and is short of the statutory period for the recovery of real property.⁷

¹ *Lewis v. McClure*, 8 Oregon, 273; *Esmond v. Chew*, 15 Cal. 137, 143. The statute of California, enacted April 1, 1870, providing for the condemnation of a right of way over or through a mining claim for the ditches, tunnels, etc., of another mining claim, is cumulative, and does not prevent the construction of ditches, etc., authorized by local customs. *Bliss v. Kingdom*, 46 Cal. 651.

² *Ante*, § 231.

³ *Union Mill Co. v. Ferris*, 2 Sawyer, 176, 185; *Vansickle v. Haines*, 7 Nev. 249; *Hobart v. Ford*, 6 Nev. 77;

Hobart v. Wicks, 15 Nev. 418; *Broder v. Natoma Water Co.*, 50 Cal. 621; 101 U. S. 274; *Titcomb v. Kirk*, 51 Cal. 288; *Cave v. Crafts*, 53 Cal. 135; *Osgood v. Eldorado Water Co.*, 56 Cal. 571.

⁴ *Union Mill Co. v. Ferris*, 2 Sawyer, 176.

⁵ *Ibid.*; *Union Mill Co. v. Dangberg*, 2 Sawyer, 450.

⁶ *Jennison v. Kirk*, 98 U. S. 453; *Noteware v. Sterns*, 1 Mon. 311; *Robertson v. Smith*, *Id.* 410.

⁷ *Dodge v. Marden*, 7 Oregon, 456.

CHAPTER VIII.

EMINENT DOMAIN.

SECTION.

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 - 254. Public mills established by statute.
 - 255. Change in the public use and additional burdens.
 - 256, 257. Duty of those maintaining roads or bridges across streams to provide suitable passage-ways for the water.
 - 258. Liability for injuries does not arise in the absence of negligence.
 - 259. Continuing trespasses and effect of judgments.
 - 260-262. Liability of municipal corporations for flowage.
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§ 241. The sovereign power of the government to affect private rights of property, as the interests of the public may require, is frequently so exercised as to materially modify natural or acquired rights in water, and in the lands over which the water flows or is conducted in artificial channels. Private property may be thus appropriated in favor of private persons, either individuals or corporations, when the public service is the object of the grant, as in the case of

private canal,¹ ferry,² or aqueduct³ companies. For such purposes the legislature may, in its discretion, appropriate the fee of lands;⁴ but its enactments will, if possible, be construed to create a servitude only, when that is sufficient to answer the public wants.⁵ The use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large or particular individuals in the locality; as in the case of a water supply and land condemned to furnish water-works for a particular city or town;⁶ of booms and dams constructed for floating lumber;⁷ the reclamation of tracts of land;⁸ the drainage of land in order to protect the public

¹ *Varick v. Smith*, 5 Paige, 137; *Spring v. Russell*, 7 Maine, 273; *Chesapeake Canal Co. v. Key*, 3 Cranch C. C. 599; *Willyard v. Hamilton*, 7 Ohio, pt. 2, p. 111; *Wabash Canal v. Spears*, 16 Ind. 440; *Rubottom v. McClure*, 4 Blackf. 505; *Chesapeake Canal Co. v. Young*, 3 Md. 480; *Black v. Delaware Canal Co.*, 22 N. J. Eq. 130; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479. As to canals in Pennsylvania, see *Craig v. Allegheny*, 53 Penn. St. 477; *Wyoming Coal Co. v. Price*, 81 Penn. St. 156; *Robinson v. West Pennsylvania Railroad Co.*, 72 Penn. St. 316; *Pennsylvania Canal Co. v. Billings*, 94 Penn. St. 40.

² *Day v. Stetson*, 8 Maine, 365; *Barrington v. Neuse River Ferry Co.*, 69 N. C. 165.

³ *Lumbard v. Stearns*, 4 Cush. 60; *Lowell v. Boston*, 111 Mass. 464; *Talbot v. Hudson*, 24 Law Rep. 228; 16 Gray, 417; *Heyneman v. Blake*, 19 Cal. 579.

⁴ *Malone v. Toledo*, 34 Ohio St. 541; *Waterworks Co. v. Burkhart*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Trustees*, 71 Ind. 208; *Harlow v. Rogers*, 12 Cush. 291; *Dingley v. Boston*, 100 Mass. 559; *People v. Haines*, 49 N. Y. 587; *Baker v. Johnson*, 2 Hill, 342.

⁵ *Edgerton v. Huff*, 26 Ind. 35; *Harback v. Boston*, 10 Cush. 295.

⁶ *Wayland v. Middlesex*, 4 Gray, 500; *Gilmer v. Lime Point*, 18 Cal. 229; *Reddall v. Bryan*, 14 Md. 444; *Kane v. Baltimore*, 15 Md. 240; *Graff v. Baltimore*, 10 Md. 544; *Boston Water Power Co. v. Boston Railroad*, 16 Pick. 512; *Badger v. South Yorkshire Railway Co.*, 5 Jur. n. s. 459; *Price v. Riverside Co.*, 56 Cal. 431; *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Attorney General v. Eau Claire*, 37 Wis. 400; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *San Francisco v. Spring Valley Waterworks*, 48 Cal. 492; *Thorn v. Sweeney*, 12 Nev. 251; *Burden v. Stein*, 27 Ala. 104; 24 Ala. 130; *Memphis v. Memphis Water Co.*, 5 Heisk. 495; *Matter of Middletown*, 82 N. Y. 196. Under 10 & 11 Vic. c. 17, §§ 37, 43, a supply of water for a workhouse is not for public purposes, the guardians being owners of the house and the inmates one family. *Liskeard Union v. Liskeard Water Co.*, 7 Q. B. D. 505.

⁷ *Lawler v. Baring Boom Co.*, 56 Maine, 443; *Lancaster v. Kennebeck Co.*, 62 Maine, 272; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Cotton v. Mississippi Boom Co.*, 22 Minn. 372; *Finney v. Somerville*, 80 Penn. St. 59; *Patterson v. Boom Co.*, 3 Dillon, 465.

⁸ *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *Avery v. Police Jury*, 12 La. Ann. 554.

health,¹ or to promote agricultural interests;² the laying of common drains and sewers;³ or the improvement of the navigation of a river.⁴ An act has been held constitutional which authorized the construction and maintenance of a line or lines of tubing for the transportation of petroleum and other oils through pipes to any railroad, navigable stream, etc.;⁵ and the condemnation of land for public roads leading to mines, for the erection of mining machinery and shafts,⁶ or for a right of way for a water ditch used for mining,⁷ is held to be a proper exercise of the right of eminent domain in the far West. So, a railroad company may be authorized to condemn land for the purpose of changing the channel of

¹ Sessions *v.* Crunkilton, 20 Ohio St. 349; Thompson *v.* Woods Co., 11 Ohio St. 678; Hagar *v.* Supervisors, 47 Cal. 222; Brown *v.* Keener, 74 N. C. 714; Pool *v.* Trealer, 76 N. C. 297; Anderson *v.* Kerns Draining Co., 14 Ind. 199; Tinder *v.* Duck Pond Co., 38 Ind. 555. *In re* Ryers, 72 N. Y. 1. *Re* Lower Chatham, 35 N. J. L. 497.

² Reeves *v.* Wood County, 8 Ohio St. 333; Patterson *v.* Baumer, 43 Iowa, 477; Norfleet *v.* Cromwell, 70 N. C. 634; 64 N. C. 1; Taylor *v.* Porter, 4 Hill, 140; People *v.* Nearing, 27 N. Y. 306; People *v.* Haynes, 49 N. Y. 587; Beekman *v.* Saratoga Railroad Co., 3 Paige, 45; Clack *v.* White, 2 Swan, 540; Binney's Case, 2 Bland Ch. 99; Oregon Cascade Railroad Co. *v.* Bailey, 3 Oregon, 164; Seely *v.* Sebastian, 4 Oregon, 25; Rutherford's Case, 72 Penn. St. 82; Blackman *v.* Halves, 72 Ind. 515; O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169; Chambers *v.* Kyle, 67 Ind. 206; Henry *v.* Thomas, 119 Mass. 583; Dingley *v.* Boston, 100 Mass. 544. A reclamation district is a public corporation. People *v.* Williams, 56 Cal. 647. In general, drains or levees for the reclamation of wet or overflowed lands can be constructed across the lands of others and the cost assessed thereon, with the owner's assent, only when the

public welfare will be promoted. Jenal *v.* Green Island Co., 12 Neb. 163. The storage of debris and the promotion of the drainage of a district are distinct. People *v.* Parks, 58 Cal. 624.

³ Ibid.; Hildreth *v.* Lowell, 41 Gray, 345; O'Reiley *v.* Draining Co., 32 Ind. 169; State *v.* Blake, 36 N. J. L. 442; Cincinnati *v.* Penny, 21 Ohio St. 499.

⁴ People *v.* Allen, 42 N. Y. 378.

⁵ West Virginia Transportation Co. *v.* Volcanic Oil Co., 5 W. Va. 382.

⁶ Bankhead *v.* Brown, 25 Iowa, 540; Dayton Mining Co. *v.* Seawell, 11 Nev. 394; Overman Silver Mining Co. *v.* Corcoran, 15 Nev. 147. But land cannot be condemned for a public road which will merely benefit an individual or corporation. Channel Co. *v.* Railroad, 51 Cal. 269.

⁷ Hand Gold Mining Co. *v.* Parker, 59 Ga. 419; Dalton *v.* Water Commissioners, 49 Cal. 222; Bliss *v.* Kingdom, 46 Cal. 651. The constitution of California provides "that the use of water now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner to be prescribed by law." See Cummings *v.* Peters, 56 Cal. 593.

a stream where the safety of the travelling public will be promoted thereby.¹ But land cannot be taken for a purely private purpose, without regard to the public good, as for a private drain or road, although compensation is made or tendered.² The legislature cannot authorize miners to build a flume on others' lands for the purpose of carrying off their tailings, or of enabling them to deposit them on such lands³ or to obtain a right of way for the more convenient mining of coal.⁴ It cannot empower voluntary associations to assume, without any necessity arising from an interruption of their own business, the control and management of others' logs floating in public navigable waters, and to enforce a lien against the logs for such control and management.⁵ So, canal commissioners, as public agents, cannot appropriate the lands of others for the purpose of compensating those who are injured by the construction of the canal;⁶ nor can they be authorized by the legislature to take from private streams more water than is necessary for canal navigation and raise a revenue by resale or other disposition of the surplus water.⁷ A statute which provides for the taking, for a private purpose, of private property with the owner's consent is constitutional, and such consent may be proved by parol acts and declarations, notwithstanding the statute of frauds, if the act does not require the consent to be in writing.⁸

¹ *Reusch v. C. B. & Q. R. Co.*, 57 Iowa, 687.

² *Embury v. Conner*, 3 N. Y. 511.

³ *Consolidated Channel Co. v. Central Pacific Railroad Co.*, 51 Cal. 269.

⁴ *Waddell's Appeal*, 84 Penn. St. 90.

⁵ *Ames v. Port Huron Log Co.*, 11 Mich. 139.

⁶ *McArthur v. Kelly*, 5 Ohio, 139.

⁷ *Buckingham v. Smith*, 10 Ohio, 297; *Cooper v. Williams*, 5 Ohio, 244; *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Erkenbrecher v. Cincinnati*, 2 Cinn. (Ohio) 412; *Fox v. Cincinnati*, 25 Alb. L. Journ. 274; *Varick v. Smith*, 5 Paige, 137; 9 Paige,

547. Surplus water is necessary to canal navigation, and may be sold or leased. But the primary object is not to create a water power, but a navigable highway. *Ibid.* And it is not *ultra vires* for a canal company which is authorized to draw water from a public river for its chartered purpose to agree to discharge its waste water at a certain point. *Armstrong v. Pennsylvania Railroad Co.*, 38 N. J. L. 1; *Hoppock v. United Railroad Co.*, 27 N. J. Eq. 286; 28 Id. 261. There is no dower in the privilege of using the surplus water of a canal. *Kingman v. Sparrow*, 12 Barb. 201.

⁸ *Embury v. Conner*, 3 N. Y. 511.

§ 242. Within reasonable and just limits the legislature has the power to determine whether a particular use is public or private, and the statutes which it enacts are presumed to be valid.¹ But in order to give effect to the constitutional limitations by which its acts are restrained, the final decision must rest with the courts in determining whether the appropriation has any element of public utility.² A constitutional provision authorizing the taking of private property for public use amounts to a declaration that for any other use such property shall not be taken from the owner without his consent and transferred to another.³ The use is none the less public because a corporation created by the laws of another State is empowered to condemn land for the purpose, or because such corporation derives pecuniary benefit from the use of the land appropriated.⁴ A State cannot condemn beyond its own limits; but it may condemn up to the State line when such line is the thread of a boundary river between States, and may thus control the use of the property of a bridge corporation organized under the laws of the State on the other side of the river.⁵ The government of the United States may, upon providing just compensation, take the property of a riparian proprietor for the purpose of affording increased facilities for navigation, and commerce between the States.⁶

¹ *Secombe v. Railroad Co.*, 23 Wall. 108; *Talbot v. Hudson*, 16 Gray, 417; *Opinion of Justices*, 8 Gray, 21; *Lowell v. Boston*, 111 Mass. 454; *Booth v. Woodbury*, 32 Conn. 118; *Allen v. Jay*, 60 Maine, 124; *Amoskeag Manuf. Co. v. Head*, 56 N. H. 386; *Twitchell v. Blodgett*, 13 Mich. 127; *Broadhead v. Milwaukee*, 19 Wis. 624; *Varick v. Smith*, 5 Paige, 137; 9 Paige, 547; *Harris v. Thompson*, 9 Barb. 350; *Bloodgood v. Mohawk Railroad Co.*, 18 Wend. 56; *Stockton Railroad Co. v. Stockton*, 41 Cal. 147.

² *Ibid.*; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 518; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Chicago Railroad Co. v. Lake*, 71 Ill. 333;

Matter of Deansville Cemetery Association, 66 N. Y. 569; *Waterworks Co. v. Burkhart*, 41 Ind. 364.

³ *Ibid.* *In re Albany Street*, 11 Wend. 149; *Embury v. Conner*, 3 N. Y. 511; *Concord Railroad v. Greely*, 17 N. H. 47.

⁴ *Matter of Townsend*, 39 N. Y. 171. The legislature, in the exercise of the police power, may prescribe regulations for vessels navigating a canal owned by a corporation in behalf of which the right of eminent domain has been exercised. *Commissioners v. Willamette Transportation Co.*, 6 Oregon, 219.

⁵ *Crosby v. Hanover*, 36 N. H. 404.

⁶ *Avery v. Fox*, 1 Abb. U. S. 246.

§ 243. In order to constitute a taking for public use, it is not necessary that the property should be absolutely converted to public purposes, but it is sufficient if its value is destroyed or permanently and seriously impaired. When real estate is actually invaded by backing water upon it by means of a dam or by any superinduced additions of water, earth, sand or other material, or by having any artificial structure placed upon it, it is a taking for which the landowner is entitled to damages,¹ even in the absence of a constitutional provision that private property shall not be taken for public use without compensation.² So the diversion, pollution, or other use of a private stream by public authorities, impairing or destroying the rights of riparian proprietors to the water, is a taking for which compensation must be provided.³ A statute which authorizes a corporation to erect, on its own land, a dam in a river which is a public highway only affords protection against an indictment for obstructing the navigation, and does not protect from liability to an action for flowing others' lands.⁴ So, authority to maintain side booms in convenient places in a river does not warrant an entry upon the close of another.⁵ The land

¹ *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Eaton v. Boston Railroad Co.*, 51 N. H. 504; *Thompson v. Androscoggin Co.*, 54 N. H. 545; *Inman v. Tripp*, 11 R. I. 520, 525; *Arimond v. Green Bay Canal Co.*, 31 Wis. 316; *Pettigrew v. Evansville*, 25 Wis. 223; *Winn v. Rutland*, 52 Vt. 481; *Jones v. United States*, 48 Wis. 404; *Cumberland v. Willison*, 50 Md. 138; *Glover v. Powell*, 10 N. J. Eq. 211; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. 200; *Morris Canal Co. v. Seward*, 23 N. J. L. 219; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 321; *Lee v. Pembroke Iron Co.*, 57 Maine, 481; *Wabash Canal v. Spears*, 16 Ind. 441; *Mabire v. Canal Bank*, 11 La. Ann. 83; *Weaver v. Mississippi Boom Co.*, 28 Minn. 534.

² *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129; *Pumpelly v. Green Bay*

Co., 13 Wall. 178. *Ex parte Martin*, 13 Ark. 199; *Cairo Railroad Co. v. Turner*, 31 Ark. 494.

³ *Union Canal Co. v. Stump*, 81 Penn. St. (Pt. 2) 355. *Ex parte Jennings*, 6 Cowen, 518; *Canal Commissioners v. People*, 5 Wend. 423; *Commissioners v. Kempshall*, 26 Wend. 404; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Walker v. Board of Public Works*, 16 Ohio, 540; *Avery v. Fox*, 1 Abb. U. S. 246; *Ferrand v. Bradford*, 21 Beav. 412; *Adams v. Slater*, 8 Brad. (Ill.) 72.

⁴ *Crittenden v. Wilson*, 5 Cowen, 165; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Lee v. Pembroke Iron Co.*, 57 Maine, 481; *Trenton Water Power Co. v. Raff*, 33 N. J. L. 335.

⁵ *Perry v. Wilson*, 7 Mass. 393.

of a riparian proprietor which is covered by water can no more be appropriated to public use, without just compensation, than any other property, and if the legislature authorizes a dock line to be established which prevents a riparian owner from constructing a dock beyond such line, which would not interfere with the public right of navigation, he is entitled to be compensated for the right of which he is thus deprived.¹ The fact that land covered by water is held subject to the public right of navigation does not justify a condemnation without compensation, or deprive the owner of the protection of the courts, if compensation is not made.² In those States in which the mortgagor of an estate is held at law to be the owner thereof as to all the world, except the mortgagee, the mortgagor is the person entitled to compensation when land previously mortgaged is taken for a public use.³

§ 244. In exercising the right of eminent domain the government does not enter into a contract, and is not, therefore, bound to complete a contemplated appropriation.⁴ But private property cannot be taken for public use without just compensation, and this must be made in money.⁵ It is competent for the legislature to impose the expense of a public improvement, such as the widening or deepening of a navigable channel, or the construction of a canal, upon property peculiarly benefitted thereby, by way of taxation, and the excess of such expense over the measure of particular

¹ Walker *v.* Shepardson, 4 Wis. 486; Yates *v.* Milwaukee, 10 Wall. 497. *Leisse v. St. Louis Railroad Co.*, 72 Mo. 561.

² Morris Canal Co. *v.* Jersey City, 26 N. J. Eq. 294.

³ Isle *v.* Schwamb, 131 Mass. 337.

⁴ Lamb *v.* Schottler, 54 Cal. 319. If the compensation is payable by monthly damages, there is no obligation to continue the payments after the public use has ceased. State *v.* Administrator of Public Accounts, 26 La. Ann. 336. But damages caused before the abandonment must be paid.

⁵ Van Horne *v.* Dorrance, 2 Dallas, 313; Carson *v.* Coleman, 11 N. J. Eq. 106; Commonwealth *v.* Peters, 2 Mass. 125; Cobb *v.* Smith, 16 Wis. 661; Livermore *v.* Jamaica, 23 Vt. 361; Butler *v.* Sewer Commissioners, 39 N. J. 665; Hyslop *v.* Finch (99 Ill.) 24 Alb. L. J. 156; Jacob *v.* Louisville, 9 Dana, 114. See McMaster *v.* Commonwealth, 3 Watts, 296; Satterlee *v.* Mathewson, 16 S. & R. 179; *ante*, § 210.

advantage, must be paid by the public at large;¹ but it cannot appoint commissioners directly to assess damages without notice to the owner,² and the appraisalment must be by a jury or impartial tribunal.³ Those whom it authorizes to condemn lands cannot be empowered to assess damages or benefits.⁴ In the absence of express words to that effect in the Constitution, it is not necessary that the compensation should be actually paid before the appropriation is made, but it is sufficient if an adequate remedy is provided by which the owner is sure to obtain compensation without unreasonable delay,⁵ or danger of litigation;⁶ and if compensation is not first made, it must be secured by some definite fund.⁷ An act which authorizes the flowage of land, and

¹ *Philadelphia v. Scott*, 81 Penn. St. 80; 9 Phila. 171; *Reed v. Erie*, 79 Penn. St. 346; *Schuffetown Fence Co. v. McAllister*, 12 Bush, 312; *Hatch v. Pottawattamie Co.*, 43 Iowa, 442; *James River Co. v. Turner*, 9 Leigh, 313; *Symonds v. Cincinnati*, 14 Ohio, 147; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 518; *State v. Newark*, 34 N. J. L. 236; *Reclamation District v. Hagar*, 6 Sawyer, 567; *Rexford v. Knight*, 15 Barb. 627; *Livingston v. New York*, 8 Wend. 85; *Holton v. Milwaukee*, 31 Wis. 27; *McIntire v. State*, 5 Blackf. 384; *Murphy v. Wilmington*, 22 Alb. L. Journ. 387. Speculative advantages cannot be set off against the damages. *Palmer Co. v. Ferrill*, 17 Pick. 58. See petition of Mount Washington Railroad Co., 35 N. H. 134; *Hartwell v. Armstrong*, 19 Barb. 166; *Frederick v. Shane*, 32 Iowa, 254; *Jacob v. Louisville*, 9 Dana, 114.

² *Langford v. Commissioners*, 16 Minn. 375; *Heyneman v. Blake*, 19 Cal. 579.

³ *People v. Nearing*, 27 N. Y. 306. *In re Ryers*, 72 N. Y. 1. Commissioners who make void assessments are *functi officio*, in the absence of further legislative authority; but it is not necessary that they should be newly

commissioned, if the legislature clothes them with all the authority they could derive from a new appointment. *Miller v. Craig*, 11 N. J. Eq. 175.

⁴ *Hessler v. Drainage Commissioners*, 53 Ill. 105. The amount of property required for a public wharf to be constructed by a municipal corporation may, it seems, be left to the discretion of the corporation. *Iron Railroad Co. v. Ironton*, 19 Ohio St. 299.

⁵ *Pittsburgh v. Scott*, 1 Penn. St. 309; *Nichols v. Somerset Railroad Co.*, 43 Maine, 356; *Bonaparte v. Camden Railroad Co.*, Bald. C. C. 205; *Raleigh Railroad Co. v. Davis*, 2 Dev. & Bat. 464; *Bensley v. Mount Lake Water Co.*, 13 Cal. 306; *Cairo Railroad Co. v. Turner*, 31 Ark. 503.

⁶ *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Orr v. Quimby*, 54 N. H. 642; *San Francisco v. Scott*, 4 Cal. 114; *Newell v. Smith*, 15 Wis. 101. See *Ash v. Cummings*, 50 N. H. 591.

⁷ *Bloodgood v. Mohawk Railroad Co.*, 18 Wend. 9; 14 Wend. 51; *Lisley v. Lobley*, 7 Ad. & El. 124; *Davidson v. Boston Railroad*, 3 Cush. 91; *Boyn-ton v. Peterboro' Railroad Co.*, 4 Cush.

provides for compensation to the land-owner only by the requirement that he shall be paid the value of the land to be ascertained by verdict in an action of trespass, affords no greater redress than that given by the common law and is invalid.¹ But the omission to make due compensation can be taken advantage of by the owner only, and if he once assents to the taking, it cannot afterwards be availed of by himself or those claiming under him.² When the injury is merely consequential, but damages therefor are directed to be paid, it is not a constitutional requirement that they shall be paid or secured before possession taken or the occurrence of the injury.³ It has been held that where the State, or a county, or town is to be liable for the damages caused by a taking for public use, its property is a fund to which the owner may look without danger of loss, and that the case of a taking by such a body differs in this respect from that of an appropriation in favor of a private corporation.⁴ Such a distinction has not, however, been always favorably regarded.⁵

§ 245. Under the right of eminent domain, water cannot be diverted from a private stream for the purpose of supplying a city, for canal purposes, or other public use,⁶

467; Charlestown Branch Railroad v. Middlesex, 7 Met. 78; Cushman v. Smith, 34 Maine, 247; McAuley v. Western Vermont Railroad Co., 33 Vt. 321; Colton v. Rossi, 9 Cal. 595; McCauley v. Weller, 12 Cal. 500; Powers v. Bears, 12 Wis. 222; Brock v. Hishen, 40 Wis. 681; Prentice v. Wallis, 37 Miss. 172; Hall v. People, 57 Ill. 316; Doe v. Georgia Railroad Co., 1 Ga. 524; 2 Kent Com. 339.

¹ Newell v. Smith, 15 Wis. 101; Ash v. Cummings, 50 N. H. 613.

² Gray, J., in Haskell v. New Bedford, 108 Mass. 214, citing Hildreth v. Lowell, 11 Gray, 345; Brown v. Worcester, 13 Gray, 31; Embury v. Conner, 3 N. Y. 511.

³ McKinney v. Monongahela Navi-

gation Co., 14 Penn. St. 65; Koch v. Williamsport Water Co., 65 Penn. St. 288; Spangler's Appeal, 64 Penn. St. 387.

⁴ Bloodgood v. Mohawk Railroad Co., 18 Wend. 9; Chapman v. Gates, 54 N. Y. 132; Ash v. Cummings, 50 N. H. 621; Lowerec v. Newark, 33 N. J. 151; McClinton v. Pittsburgh Railroad Co., 66 Penn. St. 404.

⁵ Orr v. Quimby, 54 N. H. 651; 15 Am. Law Reg. 199; Cushman v. Smith, 34 Maine, 247.

⁶ Harding v. Stamford Water Co., 41 Conn. 87; Dwight v. Boston, 122 Mass. 583; Lund v. New Bedford, 121 Mass. 286; Bailey v. Woburn, 126 Mass. 416; Nevins v. Peoria, 41 Ill. 502; Wells v. Bridgeport Hydraulic Co., 30 Conn. 316; McCord v. High,

without making compensation to the riparian proprietors whose rights are thereby injuriously affected. At a time when the constitution of New York contained no express provision against taking private property for public use without compensation, Chancellor Kent enjoined the trustees of a village, authorized by act of the legislature to supply it with water, from diverting a watercourse for this purpose, because the act made no provision for compensation.¹ If the water is abstracted by a water-works company under public authority, a riparian owner below is entitled to compensation for the injurious effect upon the stream, as well as for such parts of his land as may be taken;² and if a part of the petitioner's land is taken for a city for a storage reservoir, he is entitled to recover not only compensation for the land taken, but also for the diminution in value of the remainder of the lot, and it is competent for him to prove any fact which tends to show that the maintenance of the reservoir will impair the value of the entire lot of which it is a part.³ The diversion of the water from a natural stream by means of an artificial well, into which the water of the river percolates, is a taking of the water for which damages are recoverable.⁴ The fact that a city owns land adjoining a stream does not authorize it to supply itself with water therefrom by means of water-works at a distance of several miles, and it can lawfully take, without compensating the other riparian owners, no more of the water than would supply the family of one-

24 Iowa, 336; *Stein v. Burden*, 24 Ala. 130; 29 Ala. 127; *Stein v. Ashby*, 24 Ala. 521; 30 Ala. 363; *Burden v. Stein*, 27 Ala. 104; *Cooper v. Williams*, 5 Ohio, 391; 4 Ohio, 253; *Commissioners v. Withers*, 29 Miss. 21; *Hough v. Doylestown*, 4 Brewst. 333. A statute which incorporates a company for supplying a village with water, and provides for compensation, is not unconstitutional if it does not expressly require the company to supply all who apply for water. *Lumbard v. Stearns*, 4 Cush. 60.

¹ *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Meyers v. St. Louis*, 8 Mo.

App. 263, 275; *Eaton v. Boston Railroad Co.*, 51 N. H. 504, 510.

² *Ibid.*; *Wilts Canal Co. v. Swindon Waterworks Co.*, L. R. 9 Ch. 451; L. R. 9 Ch. 451; *Bush v. Trowbridge Waterworks Co.*, L. R. 10 Ch. 459; L. R. 19 Eq. 291; *Stone v. Yeovil*, 1 C. P. D. 691; 2 Id. 99; *Wayland v. County Commissioners*, 4 Gray, 500; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27.

³ *Johnson v. Boston*, 130 Mass. 452.

⁴ *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Waltham*, Id. 422; *Ætna Mills v. Brookline*, 127 Mass. 69; *Emporia v. Soden*, 25 Kansas, 588.

such owner.¹ If a statute merely provides a remedy for water taken for public use, it is not to be construed as conferring power to take the water;² but a statute which authorizes the taking of lands and water for public use, does not limit the right in extent or to one proceeding, nor is it exhausted by a single exercise of the power conferred.³ Where an act, which authorized a city to build water-works, provided that no application for damages for taking the water should be made until the water was actually diverted, and that any person whose water rights were thus affected might apply for damages within one year from the time when the water was first actually withdrawn, it was held that a mill-owner who suffered no serious inconvenience from the diversion until after the expiration of the year, was not entitled to apply thereafter for damages caused by an additional diversion, being entitled, at the start, to compensation for the entire capacity of the works to take.⁴

§ 246. In the case of public waters, where the proprietors of the adjacent lands own only to the water's edge, the riparian right to have the water flow past their lands in its natural course and quantity does not depend upon title to the soil under water, and, being itself a right of property, cannot be taken away or impaired without compensation. This rule is supported by recent decisions,⁵ and adopted in Missouri.⁶ It applies to the navigable fresh rivers of New York,⁷ with the exception that the riparian owners upon the

¹ *Swindon Waterworks v. Wilks & Berks Canal*, L. R. 7 H. L. 697; *Stainton v. Metropolitan Board of Works*, 29 L. J. (Ch.) 300; *Hall v. Ionia*, 38 Mich. 493. Upon a bill for an injunction in such a case,⁴ the silence of the complainant during the erection of the water-works would not constitute an equitable estoppel, as he had a right to presume that the defendant's use of the stream would not exceed the legitimate quantity. *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366.

² *Howe v. Norman* (R. I.) 13 Reporter (Feb. 1, 1882), 155.

³ *Johnson v. Utica Water Works Co.*, 67 Barb. 415.

⁴ *Ipswich Mills v. County Commissioners*, 108 Mass. 363. The year begins from the actual taking, not from a vote to take. *Goff v. Pawtucket*, 13 R. I. 471..

⁵ *Yates v. Milwaukee*, 10 Wall. 504; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Morrill v. St. Anthony Water Power Co.*, 26 Minn. 222.

⁶ *Meyers v. St. Louis*, 8 Mo. App. 266.

⁷ *Commissioners v. Kempshall*, 26 Wend. 404; *People v. Canal Appraisers*, 13 Wend. 371; 17 Wend. 616. *Ex parte Jennings*, 6 Cowen, 518; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178.

Mohawk River are not, by certain decisions, entitled to damages for any diversion or use of the waters of that river by the State.¹ In Pennsylvania, riparian owners of land adjoining its large navigable rivers have not title to the river or any right to divert its waters without license from the State.² A wrongful diversion of the water from these rivers does not affect the title to the bed of the stream, which is public property;³ and even a grant by the legislature of the exclusive right to the water power of a navigable stream is revocable at the pleasure of the State, when the use of the water is required for the public.⁴ The power to control these rivers, retained by the State, is held to be sufficient to enable it to divert, without compensation, the water for public improvements, either by its own act or by corporations created for that purpose.⁵ In Massachusetts, riparian proprietors upon a great pond cannot maintain a claim for damages for the diversion of water therefrom by an aqueduct company under legislative authority.⁶ And the same is held in Wisconsin with respect to the diversion of water from a navigable fresh river.⁷

§ 247. The construction of levees for the protection of navigation and of districts from overflow is a public use, and the legislature may impose special assessments on districts for the purpose of building them.⁸ In Louisiana, where ex-

¹ *People v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 398; *ante*, § 57.

² *Ante*, § 65; *Rundle v. Delaware Canal Co.*, 14 How. 80; 1 Wall. Jr. 275.

³ *Ibid.*

⁴ *Ibid.*; *Mayor v. Commissioners*, 7 Penn. St. 348; and authorities in next note.

⁵ *Carson v. Blazer*, 2 Binney, 475; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *McKeen v. Delaware Division Canal Co.*, 40 Penn. St. 424;

Philadelphia v. Collins, 68 Penn. St. 106; *Philadelphia v. Gilmartin*, 71 Penn. St. 140; *Rundle v. Delaware Canal Co.*, 14 How. 80; 1 Wall. Jr. 275.

⁶ *Fay v. Salem Aqueduct Co.*, 111 Mass. 27.

⁷ *Black River Improvement Co. v. La Crosse Booming Co.*, 54 Wis. 659.

⁸ *Baro v. Phillips Co.*, 4 Dillon, 216; *Rouse v. Hampton*, 4 Am. L. T. (U. S. Cts.) 195; *Tide Water Co. v. Coster*, 21 N. J. Eq. 519; *Hoagland v. Wurtz*, 41 N. J. L. 175; 42 N. J. L. 553; 39 N. J. L. 197, 433. A levee district, which exercises governmental func-

tensive inundations frequently occur, it is held that the State has power to require a riparian proprietor to construct levees without further compensation than the increased value thereby given to his land,¹ and that if he fails to do so, the levee may be kept up at his expense; that it may tax front and rear proprietors in proportion to the benefit received by each from a levee which affords them all protection;² and that it may take as much land as is necessary for the construction of these works.³ In this State, the banks of navigable rivers are subject to a servitude for the public use,⁴ and every owner of land adjacent to such rivers is bound to leave sufficient space for levees, roads, and other public works;⁵ the law concerning the taking of private property for public use does not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes, and no

tions within the district, is a public corporation, although the statute may not expressly declare it to be a corporation. *Dean v. Davis*, 51 Cal. 406. Under a statute, the object of which is the drainage of lands for agricultural and sanitary purpose, the construction of a levee several miles along a river is not auxiliary to the system of drainage. *Updike v. Wright*, 81 Ill. 49.

¹ *Lyons v. Hinckley*, 12 La. Ann. 655; *Cowley v. Copley*, 2 La. Ann. 329. See *Grant v. McDonogh*, 7 La. Ann. 447; *Hanson v. Lafayette*, 18 La. Ann. 285; *Tardos v. Jefferson*, 22 La. Ann. 58; *State v. Clinton*, 26 La. Ann. 564; *Boulligny v. Dornenon*, 2 Martin, n. s. 455.

² *De Ben v. Gerard*, 4 La. Ann. 30; *Lepretre v. General Council*, 8 La. Ann. 22; *Police Jury v. McDonogh*, 10 La. Ann. 395; 7 Martin, 8; *Beard v. Morancy*, 2 La. Ann. 347; *Barataria Co. v. Field*, 17 La. Ann. 421; *Lepretre v. New Orleans*, 10 La. Ann. 112; *State v. Merchants' Ins. Co.*, 12 La. Ann. 802; *Jamison v. New Orleans*, Id. 346; *Yeatman v. Crandell*, 11 La. Ann. 220; *Matter of New Or-*

leans Draining Co., Id. 338; *Selby v. Levee Commissioners*, 14 La. Ann. 434; *Wallace v. Sheldon*, Id. 498; *Mason v. Police Jury*, 9 La. Ann. 368; *Police Jury v. Huie*, 2 La. Ann. 887; *State v. Maginnis*, 26 La. Ann. 558.

³ *Zenor v. Concordia*, 7 La. Ann. 150; *Yeatman v. Crandall*, 11 La. Ann. 220; *Cash v. Whitmore*, 13 La. Ann. 401; *Hunsicker v. Briscoe*, 12 La. Ann. 169; *Dubose v. Levee Commissioners*, 11 La. Ann. 165; *Police Jury v. Bozman*, 11 La. Ann. 94; *Mithoff v. Carrollton*, 12 La. Ann. 185; *Inge v. Police Jury*, 14 La. Ann. 117; *O'Reilly v. Oakey*, 4 La. Ann. 22; *Smith v. Buhler*, 11 La. Ann. 98.

⁴ *Ante*, § 99.

⁵ *Hanson v. Lafayette*, 18 La. 295. In Louisiana, the space which is to be left for public use by the adjacent proprietors upon the shores of navigable rivers for roads and levees, is a servitude imposed by law, of which purchasers are bound to know the existence, and form no cause for refusing to pay the price. *Bourg v. Niles*, 6 La. Ann. 77.

arbitrary limit is fixed by law as to the maximum distance at which a levee may be placed back of a caving bank;¹ but if the public safety requires the construction of a levee upon land on which buildings have been erected at a time when no immediate servitude was due to the public, and the buildings are demolished for that purpose, the land-owner is entitled to compensation for the buildings according to their value at the time they are taken by the public.² In Pennsylvania, it is held that the State may, in the interest of navigation, confine the water by erecting embankments between the high and low-water mark of a public river, without compensation to a riparian proprietor; that the private interests of others do not justify embanking at his expense, and that when the State has made the improvement and left it in the land-owner's possession, he is bound to keep it in repair.³

§ 248. It is within the power of the legislature to change or obstruct the course of public waters as the public convenience may require.⁴ Those upon whom authority is conferred for this purpose are not liable for consequential injuries resulting from their acts,⁵ but cannot trespass upon or cut a channel through private lands without making compensation for the land so taken.⁶ When the work is of a purely public character, such as the protection of the

¹ *Dubose v. Levee Commissioners*, 11 La. Ann. 165; *Mithoff v. Carrollton*, 12 La. Ann. 185.

² *Mithoff v. Carrollton*, 12 La. Ann. 185.

³ *Philadelphia v. Scott*, 81 Penn. St. 80.

⁴ *Spring v. Russell*, 7 Maine, 273; *Carson v. Coleman*, 11 N. J. Eq. 106, 525; *People v. St. Louis*, 5 Gilman, 351; *McKernan v. Indianapolis*, 38 Ind. 233; *McMahon v. Council Bluffs*, 12 Iowa, 268; *Green v. Swift*, 47 Cal. 536; *Commissioners v. Withers*, 29 Miss. 21.

⁵ *Ibid.*; *Alexander v. Milwaukee*, 16 Wis. 247; *Thompson v. Andros-*

coggin Co., 54 N. H. 545; *Arnold v. Hudson River Railroad Co.*, 49 Barb. 108; *Clark v. Saybrook*, 21 Conn. 313; *Rogers v. Kennebec Railroad Co.*, 35 Maine, 319; *Sumner v. Richardson Lake Co.*, 71 Maine, 106; *Tyson v. Commissioners*, 28 Md. 510; *Radcliff v. Brooklyn*, 4 N. Y. 195; *People v. Albany*, 5 Lans. 524.

⁶ *Carson v. Coleman*, 11 N. J. Eq. 106, 525; *Hamilton v. Fond du Lac*, 40 Wis. 47. A corporation is not liable for damages resulting from an act which is *ultra vires*. *Wheeler v. Essex Public Road Board*, 39 N. J. L. 291. *Sed quare*, see *post*, § 260.

country from inundation, the agents of the public, when acting within the scope of their powers, are not liable for mere errors of judgment or for injuries which do not amount to a taking of property for public use.¹ The Bristol Dock Company, being authorized by act of Parliament to improve and complete the harbor of Bristol, caused such a deterioration of the water of the public river Avon, in the execution of their works, that the owners of a brewery, who had been accustomed to use the water in their business, were deprived of this benefit. It was held that the injury was common to all the king's subjects, and that the only remedy was by indictment, which in this case was taken away by the act of Parliament.² In *Dixon v. Metropolitan Board of Works*,³ the defendants, under the powers conferred upon them by Parliament, properly constructed a sewer, having its outfall into a certain creek above the plaintiff's wharf, which it was the duty of the person in charge of them to open when the water rose to a certain height reached only in heavy rainfalls. At the time of an exceptionally heavy rain, the gates were opened in order to prevent the flooding of a large district, and, the rain increasing in violence, the rush of water from the sewer carried away a part of the plaintiff's wharf with a barge moored thereto and the cargo on board. It was held that, though the injury was caused by opening the water-gates, and not by the act of God, and the defendants were *prima facie* liable for the damage done, yet as they were a public body acting in the discharge of a public duty, and the injury was the inevitable result of the authority given by Parliament, they were not liable. Where the legislature authorized the channel of a river to be turned or straightened for the protection of a city, and this being done at a point where the river emptied into another river, the

¹ *Rex v. Pagham*, 8 B. & C. 355; *Green v. Swift*, 47 Cal. 536; *Hollister v. Union Co.*, 9 Conn. 436. A county

is not liable for the act of a road overseer in so placing the abutment of a bridge that riparian land is

washed away. *Crowell v. Sonoma County*, 25 Cal. 313.

² *King v. Bristol Dock Co.*, 12 East, 429.

³ 7 Q. B. D. 418. See *Nitro-Phosphate Co. v. London Docks Co.*, 9 Ch. D. 503.

current of the first stream destroyed land upon the opposite side of the river into which it emptied, it was held that such land was not taken for public use, and that the commissioners charged with the execution of the work were not liable for the injury.¹

§ 248 *a*. If the piers of a bridge, which is authorized by the legislature, change tidal currents, a littoral proprietor is not entitled to recover the expense of structures necessary to protect his land.² "It is incident," says Shaw, C. J.,³ "to the power of the legislature to regulate a navigable stream, so as best to promote the public convenience; and if, in so doing, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*." It is also held in Vermont that if necessary erections by a railroad company upon the bed of a fresh-water stream cause such a change in the current that the land of a riparian proprietor below is gradually washed away, such proprietor cannot maintain an action for this injury, whether the erections were skilfully made or not;⁴ but in view of the decisions elsewhere this doctrine would appear to be doubtful, if applied to a case where the injury could be well avoided and is clearly the result of unskilfulness or negligence.⁵ In the recent case of *Transportation Co. v. Chicago*,⁶

¹ *Green v. Swift*, 47 Cal. 536. If a city, by statute, extends a dike into a navigable river, uninjured land-owners on the opposite shore cannot complain. *Rutz v. St. Louis*, 3 McCrary, 261.

² *Fitchburg Railroad Co. v. Boston & Maine Railroad*, 3 Cush. 58, 88; *Hollister v. Union Co.*, 9 Conn. 436; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107.

³ *Fitchburg Railroad Co. v. Boston & Maine Railroad*, 3 Cush. 58, 88; *Davidson v. Boston & Maine Railroad* 3 Cush. 91; *Thayer v. New Bedford Railroad Co.*, 125 Mass. 253; *O'Brien v. Norwich Railroad*, 17 Conn. 372.

⁴ *Henry v. Vermont Central Railroad Co.*, 30 Vt. 633; *Norris v. Ver-*

mont Central Railroad Co., 28 Vt. 99; *Chicago Railroad Co. v. Moffitt*, 75 Ill. 524. The case is to be distinguished from direct injuries like the flooding of land by backwater or diversion. *Ante*, § 122.

⁵ See *Fowle v. New Haven Co.*, 107 Mass. 352; 112 Mass. 334; *Evansville Railroad Co. v. Dick*, 9 Ind. 433, and note; *Cobb v. Illinois & St. Louis Railroad Co.*, 68 Ill. 233; *Spencer v. Hartford Railroad Co.*, 10 R. I. 14; *Stone v. Augusta*, 46 Maine, 127; *Topsham v. Lisbon*, 65 Maine, 449; *McOsker v. Burrell*, 51 Ind. 425; *Easton v. Boston Railroad Co.*, 51 N. H. 504.

⁶ 99 U. S. 635; *Weis v. Madison*, 75 Ind. 241.

the Supreme Court of the United States held that acts done in making public improvements, which do not invade upon private property, are not a taking for which compensation must be made, and that the plaintiff company which owned a lot in Chicago, with dock and wharf privileges, was not entitled to recover from the city damages caused by obstructing a neighboring street and the river by the construction of a bridge or tunnel across the river.

§ 249. Mr. Justice Story doubted whether for an injury to private property the owner can be denied compensation upon the ground that it is merely consequential,¹ and the doctrine, as sometimes applied, has been since declared by the Supreme Court of the United States to have been carried to the utmost limit.² Where an embankment erected on the Delaware River, under authority from the legislature, for the purpose of preventing the flooding of neighboring meadows, obstructed a right of fishery which included the right to draw nets upon the shore, the Supreme Court of Pennsylvania held the injury to be merely consequential and not ground for an action.³ This would appear to be in conflict with those decisions in which it is held that the right of access to and from navigable waters is a private right which cannot be impaired without compensation.⁴ In this State it is held that damages are not recoverable for the destruction of a ford by a public improvement,⁵ or the loss of a spring between the high and low-water mark of a tidal river;⁶ and that the erection of a dam for the purpose of improving

¹ *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

² *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

³ *Tinicum Fishing Co. v. Carter*, 90 Penn. St. 85; 61 Id. 21; 77 Id. 310; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346. Acts of incorporation are valid which do not provide for the payment of consequential damages, but if the terms of a statute authorizing a pub-

lic improvement provide for the allowance of such damages, they are to be included. *Hoffer v. Pennsylvania Canal Co.*, 87 Penn. St. 221; *Reitenbaugh v. Chester Valley Railroad Co.*, 21 Penn. St. 100; *Re Cooling*, 19 L. J. (Q. B.) 25.

⁴ *Ante*, § 149.

⁵ *Zimmerman v. Union Canal Co.*, 1 Watts & S. 346.

⁶ *Commonwealth v. Fisher*, 1 Penn. 462; *ante*, § 65.

the navigation of a river which is public property, and thereby causing the water to flow back into the plaintiff's mill-race and to injure his fall and water power, are injuries which must be suffered without compensation, upon the ground that every one who buys property upon a navigable stream purchases subject to the superior right of the State to regulate and improve it for the public benefit.¹ In New York, if the improvement of the navigation of a public river causes the waters of a tributary stream to be so much raised as to destroy a valuable mill-site situated thereon, and the stream is generally navigable, although not so at the mill-site, the owner is not entitled to damages under the canal laws, which provide that compensation shall be made for private property taken for public use.² Consequential as well as direct damages are recoverable when the injury is caused by a common nuisance.³ The grantee of a ferry franchise from the legislature of a State acquires, by such franchise, no property in the flow of the river, and has no claim to compensation for injuries caused to him by an improvement of the river by the United States.⁴

§ 250. With respect to injuries which are not the result of negligence or bad faith in the execution of the powers conferred, a corporation acting under public authority is presumed to act within the scope of the powers granted by its charter, and the only redress for such injuries is in the mode and by the means provided by statute.⁵ If, for ex-

¹ *McKeen v. Delaware Canal Co.*, 49 Penn. St. 424; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Ueberoth v. Lehigh Coal Co.*, 8 Haz. Pa. Reg. 292. The right to maintain an action for consequential damages against a corporation possessed of the right of eminent domain is reversed by the new constitution of Pennsylvania. *Reading v. Althouse*, 93 Penn. St. 400.

² *Canal Appraisers v. People*, 17 Wend. 571; 5 Wend. 423; 13 Wend. 355; *People v. Canal Appraisers*, 33 N. Y. 461.

³ *Hughes v. Heiser*, 1 Binney, 463; *Pittsburgh v. Scott*, 1 Penn. St. 309.

⁴ *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508.

⁵ *Attorney General v. Conservators of the Thames*, 1 H. & M. 1; *Attorney General v. Metropolitan Board of Works*, 1 H. & M. 298; *Mellen v. Western Railroad*, 4 Gray, 301; *Lathrop v. Grosvenor*, 10 Gray, 52; *Ashby v.*

ample, it is essential to divert a stream in the construction of a railroad within the lines of the land condemned, this may be done without an express grant of such right, and if the attention of the jury of inquest was called to the diversion, they are presumed to have included it in the award of damages, and the owner of the land through which the road passes has no further redress by suit at law or in equity.¹ An assignment which is void for uncertainty is not a bar to an action. In *McCord v. Sylvester*,² commissioners appointed in pursuance of a statute decided that the plaintiff was not entitled to damages for the diversion of a creek from his premises, "provided sufficient water shall be suffered to flow in the channel of said creek for ordinary and necessary farm purposes." This was held to be void as not properly showing the amount of water to which the plaintiff would be entitled, and an action on the case against the defendants who had caused the diversion was maintained. If a man deals with a public body having power to take his property, claiming compensation, and afterwards contends that they have no right to take the property, a court of equity will not relieve him.³ But where the occupier of a wharf on a public creek, who claimed compensation against town commissioners for having arched over the creek and so interrupted his navigation, believed, at the time of the claim, that the commissioners had the power to act, but afterwards, learning that they had acted

Eastern Railroad, 5 Met. 368; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Brewer v. Boston Railroad Co.*, 113 Mass. 52; *Spring v. Russell*, 7 Maine, 273; *Woods v. Nashua Manuf. Co.*, 4 N. H. 527; *Aldrich v. Cheshire Railroad Co.*, 21 N. H. 359; *Steele v. Western Island Co.*, 2 Johns. 283; *Beltinger v. New York Central Railroad*, 23 N. Y. 42; *Terre Haute Railroad Co. v. McKinley*, 33 Ind. 274; *Pittsburgh v. Scott*, 1 Penn. St. 309; *Dyer v. Tuskaloosa Bridge Co.*, 2 Porter, 296; *McCann v. Otoe County Commissioners*, 9 Neb. 324; *McOsker v.*

Burrell, 55 Ind. 425; *Cumberland v. Willison*, 50 Md. 138; *West Branch Canal Co. v. Mullinger*, 68 Penn. St. 357; *McIntire v. Western Railroad Co.*, 67 N. C. 278; *Lafayette Plankroad Co. v. New Albany Railroad Co.*, 13 Ind. 90; *Little v. Dublin Railway Co.*, 7 Ir. C. L. 82.

¹ *Baltimore Railroad Co. v. Magruder*, 34 Md. 79; *Stodghill v. Chicago Railroad*, 43 Iowa, 26.

² 32 Wis. 451. See *Harris v. Social Manuf. Co.*, 9 R. I. 99.

³ *Pentney v. Lynn Paving Commissioners*, 13 W. R. 983.

illegally, at once filed his bill for a mandatory injunction, it was held that he was not estopped by his claim for compensation, and a reference was made to chambers to assess damages.¹ If land is appropriated or injured by the construction of a canal without authority of law, the legislature cannot, by retroactive legislation authorize the appointment of commissioners for the appraisement of damages, and thereby deprive the land-owner of his right to maintain an action.² An act which provides no means for ascertaining and paying the damages sustained, is invalid, and the land-owner is remitted to his remedy at law;³ and the common-law remedy for breach of a statutory duty is not defeated by the fact that the statute which imposes the duty but contains no provision for compensation, provides a mode of enforcing the duty.⁴ Compulsory powers, conferred by a special act, must be expressed clearly; if doubtful, they will be construed in favor of the land-owner.⁵

§ 251. A land-owner who sustains injury from the construction of works authorized by statute is not entitled to compensation, under the provisions of the statute, unless the injury is such as to give a right of action had the works not been authorized;⁶ but it does not follow, because a person might have maintained an action before the statute, that he

¹ *Ibid.*

² *Matter of Townsend*, 39 N. Y. 171. In *Harding v. Stamford Water Co.*, 41 Conn. 87, it was held that, under the provision for compensation in an amendment to the charter of a corporation which authorized the diversion of water from a stream, a reasonable time should be allowed to make the compensation before issuing a perpetual injunction. See, also, *Bonaparte v. Camden Railroad Co.*, Bald. C. C. 205; *Bailey v. Philadelphia Railroad Co.*, 4 Harr. (Del.) 389.

³ *Stevens v. Middlesex Canal*, 12 Mass. 466; *Coggswell v. Essex Mill Corporation*, 6 Pick. 94; *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. 501;

Lee v. Pembroke Iron Co., 57 Maine, 481; *Sinnockson v. Johnson*, 17 N. J. L. 129.

⁴ *Ross v. Ruge Price*, 1 Ex. D. 269, *Atkinson v. Newcastle Waterworks Co.*, L. R. 6 Ex. 404; *Reg. v. Darlington Board of Health*, 33 L. J. N. S. (Q. B.) 305; 13 W. R. 79.

⁵ *Simpson v. South Staffordshire Waterworks Co.*, 11 Jur. N. S. 453.

⁶ *New River Co. v. Johnson*, 2 El. & El. 435; *Chamberlain v. West of London Railway Co.*, 2 B. & S. 605; *Beckett v. Midland Railway Co.*, L. R. 3 C. P. 82; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; L. R. 8 C. P. 191; L. R. 7 C. P. 508.

would, in respect of the same cause, have a claim to compensation after it.¹ When land is taken for the construction of a canal or other public works, its value is to be fixed at what it was worth at the time of the taking.² Where the water commissioners of a city took certain land for the purpose of making a reservoir, and afterwards, requiring more land, took that of the petitioners, to whom the land first taken did not belong, it was held that the value of their land was to be estimated as of the time of the condemnation and not of the location of the improvement.³ A statutory provision that, in the assessment of damages in such cases, the benefits resulting to the owner of the land from the construction of the work shall be considered, is valid,⁴ but the inquiry as to the enhanced value of the land must be confined to the benefits accruing, at the time of the taking, to such of the owner's land as adjoins that taken, and not include the advantages resulting to him generally.⁵ If a company builds a railroad across land through which it has previously made a canal, the fact that the canal was a cheap and sufficient means of conveying the land-owner's products is to be considered in assessing the damages, and it is immaterial that the company owned and might abandon the canal.⁶ The measure of the damages is the value, for any use, of that which is appropriated. The value of a pond taken for the purpose of supplying a village with water is not limited to its use as a mill or ice pond, but the fact that there are no other ponds in the neighborhood which would answer the purpose may be shown in evidence.⁷ So, if an island is taken in a State where the floating of logs down streams is a regular business, the fact

¹ *Ricket v. Metropolitan Railway Co.*, L. R. 2 H. L. 175; *Pittsburgh v. Scott*, 1 Penn. St. 309.

² *Parks v. Boston*, 15 Pick. 198; *McIntire v. State*, 5 Blackf. 384. In Pennsylvania the value is to be estimated as of the date when the injury is complete. *Philadelphia v. Linard*, 97 Penn. St. 242.

³ *Stafford v. Providence*, 10 R. I. 567.

⁴ *McIntire v. State*, 5 Blackf. 384.

⁵ *Vanblaricum v. State*, 7 Blackf. 209; *State v. Digby*, 5 Blackf. 543.

⁶ *Pennsylvania Railroad Co. v. Burnell*, 81 Penn. St. 414.

⁷ *Trustees v. Dennett*, 5 Thomp. & Cook (N. Y.) 217; 2 Hun, 669. See *New Britain v. Sargent*, 42 Conn. 137.

that the island is adapted, in connection with the river bank, to form booms for holding logs should be considered.¹

§ 252. In general, only the injuries to the land through which the works are constructed are included in the assessment of damages. The appraisal of damages for land taken for a canal cannot include damages for trespasses on other lands of the same claimant by the workmen employed in constructing the canal;² and if it is necessary to dig ditches for the proper drainage and protection of a railroad or other public work, the land should be condemned for that purpose.³ But as the grant of power to execute a public work carries with it authority to do whatever is strictly and necessarily incident to the prosecution of the work, the grantee is not liable as a wrongdoer, but only in the mode provided by statute, for injuries to adjacent lands, which are reasonably necessary to the maintenance of the work, whether caused by draining water upon them by means of a culvert, or by widening or changing the bed of a stream, or by conducting the waters of a spring, opened in the construction of the work, upon land not condemned, by means of an artificial channel.⁴ Where the owner of land taken by a railway company had built a reservoir on other land belonging to him for the purpose of supplying mills to be erected on the land taken, it was held that the land not taken was "injuriously affected" within the meaning of the statute providing for compensation, and that evidence of the prospective profits to be derived from supplying the water to the pro-

¹ *Boom Co. v. Patterson*, 98 U. S. 403. In *Eddings v. Seabrook*, 12 Rich. 504, it was held that the value of land condemned for a public wharf is not to be determined by its value if a wharf were already thereon. If an embankment made to protect land is used by a railroad, and its usefulness for that purpose is not impaired, the owner's damages are not the cost of the embankment, but only indemnity for the injury. *Gear v. C. C. & D. R. Co.*, 39 Iowa, 23.

² *People v. Schuyler*, 69 N. Y. 242.

³ *State v. Armell*, 8 Kansas, 288; *Hooker v. New Haven Co.*, 15 Conn. 312.

⁴ *Curtis v. Eastern Railroad Co.*, 14 Allen, 55; *Babcock v. Western Railroad*, 9 Met. 553; *Dodge v. County Commissioners*, 3 Met. 380; *Ashby v. Eastern Railroad*, 5 Met. 371; *Brown v. Providence Railroad*, 5 Gray, 35.

posed mills was rightly considered in the estimate of damages.¹ The assessment of damages to the owners of land through which a railroad is located, may and should include such injuries as the following: the expense of ditches rendered necessary by the road upon parts of the land not taken;² the loss of a water power, even when it has not been utilized,³ or of a permanent easement in a canal;⁴ a decrease in the quantity of sediment deposited on agricultural land and by which it is enriched;⁵ injury and inconvenience as to water caused by a division of farm lands;⁶ and it is presumed to include damages for the loss of springs upon the lands through which the road passes, even though such injury could not be anticipated.⁷ A grantor of land who has reserved the privilege of a water power, and the right to enter upon so much of the land as may be necessary for an abutment on the bank of the river, has such an interest in the land that it cannot be appropriated by a railroad company without ascertaining, in the mode indicated by statute, what damages he will sustain;⁸ and a tenant for years is as much entitled to damages for the injuries caused as the owner in fee.⁹

¹ *Ripley v. Great Northern Railroad Co.*, L. R. 10 Ch. 435.

² *St. Louis Railroad Co. v. Mollett*, 59 Ill. 235.

³ *Dorlan v. East Brandywine Railroad Co.*, 46 Penn. St. 520; *Haslem v. Galena Railroad Co.*, 64 Ill. 353; *Lake Superior Railroad Co. v. Greve*, 17 Minn. 322.

⁴ *Whitman v. Boston & Maine Railroad*, 3 Allen, 133.

⁵ *Concord Railroad v. Greeley*, 23 N. H. 237.

⁶ *Rockford Railroad Co. v. McKinley*, 64 Ill. 338; *Brooks v. Davenport Railroad Co.*, 37 Iowa, 99; *Kostendater v. Pierce*, Id. 645; *Mississippi Bridge Co. v. Ring*, 58 Mo. 491.

⁷ *Peoria Railway Co. v. Bryant*, 57 Ill. 473; *Lafayette Plank Road v. New Albany Railroad*, 13 Ind. 90;

Wabash Canal v. Spears, 16 Ind. 441; *Robbins v. Milwaukee Railroad Co.*, 6 Wis. 636; *Aldrich v. Cheshire Railroad Co.*, 21 N. H. 359. A grant to a railroad company of "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway," gives the legal right to dig a well upon such right of way, and to use the water supplied by percolation for railway purposes, although such use may materially diminish the supply of water in a spring upon the grantor's land. *Hougan v. Milwaukee Railroad Co.*, 35 Iowa, 558.

⁸ *Galena Railroad Co. v. Haslem*, 73 Ill. 494.

⁹ *Grand Rapid Booming Co. v. Jarvis*, 30 Mich. 308; *Matter of Water Commissioners*, 4 Edw. Ch. 545.

§ 253. Mill acts have been sometimes regarded as a proper exercise of the right of eminent domain by private persons for their exclusive private benefit, and it has been considered that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the invocation of this principle in their behalf as a public use.¹ This exercise of legislative authority has been so long continued in many States, with the acquiescence of the courts, as to practically preclude the latter from denying that these laws are in harmony with their constitutions.² "That mills," says the Supreme Judicial Court of Massachusetts,³ "for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may be properly exercised; as in the case of the Boston & Roxbury Mill Corporation, and the Salem Mill-dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise." In *Boston & Roxbury Mill Corporation v. Newman*,⁴ the plaintiffs were authorized by their act of incor

¹ *Great Falls Manuf. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Manuf. Co. v. Head*, 56 N. H. 386; *Olmstead v. Camp*, 33 Conn. 532, 551; *Todd v. Austin*, 34 Conn. 78; *Tyler v. Beacher*, 44 Vt. 648; *Beekman v. Saratoga Railroad Co.*, 3 Paige, 45, 73; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694; *Venard v. Cross*, 8 Kansas, 248; *Harding v. Funk*, Id. 315; *Harding v. Goodlett*, 3 Yerger, 41; *Newcomb v. Smith*, 1 Chand. 71; 2 Phin. 131; *Thien v. Voegtlander*, 3 Wis. 461; *Pratt v. Brown*, 3 Wis. 603; *Babb v. Mackey*, 10 Wis. 371; 16 Wis. 661; *Eason v. Perkins*, 2 Dev. Eq. 38; *Daughtry v. Warren*, 85 N. C. 136.

² *Burnham v. Thompson*, 35 Iowa, 421; *Fisher v. Horicon Iron Co.*, 10 Wis. 351.

³ *Lowell v. Boston*, 111 Mass. 454, 464; *Olmstead v. Camp*, 33 Conn. 552.

⁴ 12 Pick. 467; *Boston Water Power Co. v. Boston and Worcester Railroad*, 23 Pick. 360.

poration to erect and maintain a dam or dams for the purpose of obtaining a head and fall of the waters of a navigable arm of the sea, whereby to work grist mills, iron manufactories, and mills for other useful purposes, and also to make an avenue over the dams for the accommodation of all persons at a fixed rate of toll. This was held to be so far an enterprise of a public nature as to authorize the legislature to appropriate the property of an individual to carry it into effect. According to the view adopted in the case from which the above language is quoted, statutes which authorize the maintenance of a dam to raise a head of water and thereby to overflow the land of another proprietor, do not confer any right upon the mill-owner in the overflowed land by creating an easement, or take any right from the land-owner, but are merely provisions of law for the regulation of the rights of the different riparian proprietors upon the same stream, both in respect to the stream itself, from its rise to its outlet, and their adjacent lands liable to be affected by its use, in a manner best calculated to promote and secure their common rights as such proprietors.¹ This is not a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.² Upon a similar principle, the privilege of fishing in streams and ponds not navigable is a private right which is constantly controlled or partially taken away by statutory regulations intended for the benefit of all those whose lands adjoin the stream or pond.³ In Michigan,⁴ Alabama,⁵ Georgia,⁶ and New

¹ *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141; *Andover v. Sutton*, 12 Met. 182; *Bates v. Weymouth Iron Co.*, 8 Cush. 553; *Murdock v. Stickney*, 8 Cush. 113; *Hazen v. Essex Co.*, 12 Cush. 475; *Storm v. Manchaug Co.*, 13 Allen, 10; *Lowell v. Boston*, 111 Mass. 466; *Hunt v. Whitney*, 4 Met. 603; *Talbot v. Hudson*, 16 Gray, 417; *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 450.

² *Shaw, C. J.*, in *Murdock v. Stickney*, 8 Cush. 113.

³ *Cottrill v. Myrick*, 12 Maine, 222; *Commonwealth v. Essex Co.*, 13 Gray,

249. Compensation for an injury to a private right of fishery does not relieve the owner of a dam authorized by the legislature from the duty to provide fish-ways. *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446; *Holyoke Co. v. Lyman*, 15 Wall. 500.

⁴ *Ryerson v. Brown*, 35 Mich. 333; See *Hardwell*, Petitioner, 2 Mich. N. P. 97; *McClary v. Hartwell*, 25 Mich. 139.

⁵ *Sadler v. Langham*, 34 Ala. 311; *Bottoms v. Brewer*, 54 Ala. 288.

⁶ *Loughbridge v. Harris*, 42 Ga. 500.

York,¹ mill acts have been pronounced unconstitutional upon the ground that they authorize the taking of private property for other than public uses, and the current of modern authority, even on the part of those courts which sustain the statutes, is adverse to their validity if regarded as an exercise of eminent domain.² These acts, if they do not so provide expressly, are not applicable to cases where dams are built across navigable streams.³ They have no extra-territorial effect, and do not apply to dams built out of the State.⁴

§ 254. In some States certain mills, especially grist mills, are made public mills by statute, being required by law to grind for all in due turn for regulated tolls. Laws of this character have been enacted in Virginia, North Carolina, Kentucky, Tennessee, Alabama, and Georgia; and the power of the legislature to exercise the right of eminent domain in behalf of mills that grind grain for toll, and are compellable by law to render impartial service for all, appears not to have been denied.⁵ In Vermont it has been held that a statute which required that all grain received at grist mills should be well and sufficiently ground at certain fixed rates of toll, but which did not require that any grain should be received at such mills, could not constitutionally confer the right to flow the lands of others for the purposes of such a mill.⁶ A statute which authorizes towns or counties to issue

¹ *Hay v. Cohoes Co.*, 3 Barb. 42; 2 N. Y. 159.

² *Jordan v. Woodward*, 40 Maine, 317; *Jones v. Skinner*, 61 Maine, 25; *Powers v. Bears*, 12 Wis. 213; *Fisher v. Haricon Iron Co.*, 10 Wis. 351; *Newcomb v. Smith*, 1 Chand. 71; *Pratt v. Brown*, 3 Wis. 603; *Miller v. Troost*, 14 Minn. 365; *Harding v. Funk*, 8 Kansas, 315; *Occum Co. v. Sprague Co.*, 35 Conn. 496; *Finney v. Somerville*, 80 Penn. St. 59.

³ *Cobb v. Smith*, 16 Wis. 661; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Fox v. Holcomb*, Id. 298.

⁴ *Salisbury Mills v. Forsaith*, 57 N. H. 124; *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246.

⁵ *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433; *Burgess v. Clark*, 13 Ired. 109; *Bottoms v. Brewer*, 54 Ala. 288; *McAfee v. Kennedy*, 1 Litt. 92; *Shackelford v. Coffee*, 4 J. J. Marsh. 40; *Harding v. Goodlet*, 3 Yerger, 41; *Sadler v. Langham*, 34 Ala. 311, 325; *Hankins v. Lawrence*, 8 Blackf. 266.

⁶ *Tyler v. Beacher*, 44 Vt. 648.

bonds "to aid in the construction of railroads, water power, or other works of internal improvement," includes grist mills, whether run by water or steam, when these are made public mills by statute;¹ but a steam grist mill is not a work of internal improvement within the meaning of a statute authorizing the issue of municipal and county bonds to aid in the construction and completion of such works.²

§ 255. When property is taken for a particular public use, it does not become public for all purposes.³ The first taking does not withdraw it from liability to be taken for another public use, and if an appropriation has been made for one such use under statutory authority, it may, under like authority, be devoted to another use, without additional compensation to the owner, as when land taken and used for a canal is used for a road by authority of the legislature.⁴ So the erection by authority of the legislature, of a toll-bridge in the highway across a stream where a ferry has previously been operated by the riparian owner, imposes no new servitude upon the land, and entitles its owner to no compensation.⁵ But the appropriation by a railroad of land previously occupied as the bank of a canal is an additional easement for which the owner of the soil in fee would be entitled to recover damages.⁶ So if a railroad is built across a right of

¹ *Burlington v. Beasley*, 94 U. S. 310.

² *Osborne v. County of Adams*, 106 U. S. 181.

³ *Grand Rapids Railroad Co. v. Grand Rapids & Indiana Railroad Co.*, 35 Mich. 265; *West Boston Bridge v. Middlesex*, 10 Pick. 270; *Worcester Railroad v. Railroad Commissioners*, 118 Mass. 561; *State v. Noyes*, 47 Maine, 189. When the state condemns the fee of land for a canal, and afterwards devotes the land to the purposes of a highway, a cessation of the latter use does not revert the title in the former owner. *Haldeman v. Pennsylvania Railroad Co.*,

50 Penn. St. 425; *Wyoming Coal Co. v. Price*, 81 Penn. St. 156.

⁴ *Malone v. Toledo*, 28 Ohio St. 643; *Hatch v. Cincinnati Railroad Co.*, 18 Ohio St. 92; *Cincinnati Railroad Co. v. Zinn*, 18 Ohio St. 417; *Shanklin v. Evansville*, 55 Ind. 240; *Stondinger v. Newark*, 28 N. J. Eq. 187, 446; *Chase v. Sutton Manuf. Co.*, 4 Cush. 152; *Chicago Railroad Co. v. Lake*, 71 Ill. 333.

⁵ *Jones v. Keith*, 37 Texas, 394; *Hudson v. Cuero Land Co.*, 47 Texas, 56.

⁶ *Lafayette Railroad Co. v. Murdock*, 68 Ind. 137; *Harrington v. St. Paul Railroad Co.*, 17 Minn. 215; *State v. Laverack*, 34 N. J. L. 201.

flowage,¹ or a landing,² it is an additional burden, and if by the change from one use to another, increased injury is done,³ or easements are impaired to a greater extent than before,⁴ or access to the land is made more difficult,⁵ compensation must be made for the injury. Property which is already held for a public use cannot be condemned to another public use without legislative authority, and the subsequent grant will not be construed as authorizing the subversion or destruction of the former, unless such intent appears by express words or necessary implication.⁶ Thus, the board of public works of the State of Ohio has been held to have no authority to grant to a railroad corporation the right to lay its track along the berme-bank of a navigable canal belonging to the State.⁷ A railroad company, which is authorized by statute to select a route for its road, cannot take land which is already occupied, under authority from the legislature, by a canal,⁸ or by a reservoir erected by a city.⁹ A water company cannot condemn land which is in use as a public street, when there are other means of carrying its powers into effect.¹⁰ The authority given by mill acts to flow land, does not justify the flooding of a public road¹¹ or bridge,¹² and land occupied by the United States for an armory cannot be flowed under these statutes.¹³ A private

¹ *Davidson v. Boston Railroad*, 3 Cush. 91.

² *Railroad Co. v. Schurmeir*, 7 Wall. 272; *post*, § 257.

³ *Gordon v. Pennsylvania Railroad Co.* (Penn. 1878) 6 Rep. 727.

⁴ *Whitman v. Boston & Maine Railroad*, 7 Allen, 313.

⁵ *Chicago Railroad v. Stein*, 75 Ill. 41; *Hatch v. Cincinnati Railroad*, 18 Ohio St. 92; *Gordon v. Pennsylvania Railroad*, 6 Rep. 727.

⁶ *Little Miami Railroad Co. v. Dayton*, 23 Ohio St. 510; *Hickock v. Hine*, Id. 522; *Bridgeport v. New York Railroad*, 36 Conn. 255; *Re Buffalo*, 68 N. Y. 167; *Locks and Canals v. Lowell*, 7 Gray, 223.

⁷ *State v. Cincinnati Central Rail-*

road Co., 37 Ohio St. 157. See *State v. Newark*, 28 N. J. L. 529.

⁸ *Hudson Canal Co. v. New York Railroad Co.*, 9 Paige, 323; *Tuckahoe Canal v. Tuckahoe Railroad*, 11 Leigh, 42; *Housatonic Railroad v. Lee Railroad*, 118 Mass. 391.

⁹ *State v. Montclair Railway Co.*, 35 N. J. L. 328.

¹⁰ *Ex parte Manhattan Co.*, 22 Wend. 653; *Bradshaw v. Rogers*, 20 Johns. 103, 735; *Springfield v. Connecticut Railroad Co.*, 4 Cush. 63.

¹¹ *Commonwealth v. Stevens*, 10 Pick. 247; *Venard v. Cross*, 8 Kansas, 248.

¹² *Hooksett v. Amoskeag Manuf.* 44 N. H. 105.

¹³ *United States v. Ames*, 1 Wood. & M. 76.

corporation, which is authorized by its charter to construct a canal, sluice, or raceway, and which cuts or digs it across an existing highway, is bound to provide a bridge for the public passage along the highway, without an express provision in its charter to that effect;¹ but if, after the construction of the canal, a highway is laid out across it, its owner is not bound to erect or maintain a bridge.² While a corporation, under a general power of eminent domain, cannot, without special authority, deprive another corporation with a like power of lands held by it for a public use, yet an easement may be acquired, *in invitum*, by legislative authority, in lands so held and occupied for a public use when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted.³ When a ferry franchise is held by a municipal corporation, it does not lose its character of private property, and cannot be resumed by the public without making just compensation.⁴ But if the legislature authorizes a bridge to be built at a point where there was an ancient ferry, and provides for compensation to the owner of the ferry, which is accepted, the ferry is abolished, and such taking for public use does not transfer the ferry franchise to the proprietors of the bridge.⁵ The fact that property is held under a covenant of quiet enjoyment from a city does not prevent its board of aldermen, if authorized by statute, from taking such property in laying out a street over tide-waters.⁶

¹ *Re Trenton Water Power Co.*, Spencer (N. J.) 659.

² *Morris Canal Co. v. State*, 24 N. J. L. 62.

³ *New York Central Railroad Co. v. Metropolitan Gaslight Co.*, 63 N. Y. 326; *Matter of Rochester Water Commissioners*, 66 N. Y. 413; *Re New York Central Railroad Co.*, 77 N. Y. 248; *Boston Water Co. v. Boston & Worcester Railroad*, 23 Pick. 360, 397; *Matter of Main and Hamburg Street Canal*, 50 How. Pr. 70; *James River Co. v. Anderson*, 12 Leigh, 278.

⁴ *Benson v. New York*, 10 Barb. 223. So the property rights of a county, though acquired by donation from the State, are protected by the constitutional guarantees which protect the property of individual citizens. *Milam County v. Bateman*, 54 Texas, 153.

⁵ *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 352.

⁶ *Brimmer v. Boston*, 102 Mass. 19.

§ 256. When individuals or corporations construct and maintain roads or bridges across streams under authority conferred by the legislature, they are bound to provide suitable passage ways for the water,¹ and to keep them unobstructed by drift or mud,² and are liable to the owners of private lands adjoining, which are injured in consequence of their insufficiency. Thus, a railroad company which neglects to construct sluices or culverts over streams crossed by its road, or which constructs them so imperfectly as to flood the adjoining lands, is liable to an action for the injury whether any portion of such lands is taken for the purposes of the road or not.³ Such injury is not one that is taken into account in measuring the compensation to the owner of land through which the road is located, but the company is answerable in damages by a repetition of suits, or if the flooding is permanent and unnecessary, the obstruction may be abated by a court of equity.⁴ So, if a railroad company,

¹ *New Castle Railroad Co. v. McChesney*, 85 Penn. St. 522; *Oregon Railroad Co. v. Barlow*, 3 Oregon, 311; *Whitehouse v. Birmingham Canal Co.*, 5 H. & N. 928; *Perley v. Chandler*, 6 Mass. 454; *Rowe v. Granite Bridge*, 21 Pick. 344; *Blood v. Nashua Railroad*, 2 Gray, 137; *Mellen v. Western Railroad*, 4 Gray, 301; *Jones v. West Vermont Railroad Co.*, 27 Vt. 399; *Addison v. Rowe*, 34 N. H. 396; *Manser v. Northern Counties Railway Co.*, 2 Rail. Cas. 380.

² *West v. Louisville Railroad Co.*, 8 Bush, 404; *Chicago Railroad Co. v. Moffitt*, 75 Ill. 524.

³ *Bagnall v. London Railway Co.*, 1 H. & C. 544; 7 H. & N. 723; *Lawrence v. Great Northern Railway Co.*, 10 Q. B. 643; *Hatch v. Vermont Central Railroad Co.*, 25 Vt. 49, 68; *Norris v. Vermont Central Railroad Co.*, 28 Vt. 102; *King v. Iowa Midland Railroad Co.*, 34 Iowa, 458; *Mississippi Central Railroad v. Caruth*, 51 Miss. 77; *Mississippi Central Railroad Co. v. Mason*, Id. 234; *Baughton v. Carter*, 18 Johns. 405; *Cott v. Lewiston Rail-*

road, 36 N. Y. 214; *Brown v. Cayuga Railroad Co.*, 12 N. Y. 486; *Robinson v. New York Railroad Co.*, 27 Barb. 512; *Beaty v. Baltimore Railroad Co.*, 6 W. Va. 388; *Houston Railroad Co. v. Knapp*, 51 Texas, 592; *Young v. Chicago Railway Co.*, 28 Wis. 171; *Chicago Railroad Co. v. Carey*, 90 Ill. 514; *Locks and Canals v. Nashua Railroad Co.*, 10 Cush. 385; *Estabrooks v. Peterborough Railroad*, 12 Cush. 224; *March v. Portsmouth Railroad Co.*, 19 N. H. 372; *Hooker v. New Haven Railroad Co.*, 14 Conn. 146; 15 Conn. 313; *Nicholson v. New York Railroad Co.*, 22 Conn. 74; *Selma Railroad Co. v. Keith*, 53 Ga. 178; *Toledo Railway Co. v. Hunter*, 50 Ill. 325; *Alton Railroad Co. v. Deitz*, 50 Ill. 210; *Louisville Railroad Co. v. Hodge*, 6 Bush, 141; *Louisville Railroad Co. v. McAfee*, 30 Ind. 291; *Union Trust Co. v. Kuppy*, 26 Kansas, 754; *Van Orsdol v. B. R. Co.*, 56 Iowa, 470.

⁴ *Raleigh Air Line Railroad Co. v. Wicker*, 74 N. C. 220; *Brown v. Carolina Central Railroad Co.*, 83 N. C.

in building its road, finds it necessary to divert a stream, and for that purpose to construct a new channel, it is bound to keep the new channel in a suitable condition so as to preserve the usefulness of the stream for those entitled to it.¹ Except in cases of strict necessity, a railroad company has no right to divert a stream of water from its natural channel to the injury of the land-owner,² and if the diversion is merely convenient and not necessary, it may be restrained by injunction.³ By voluntarily granting a right of way for a railroad, the grantor does not license the building of the road so as to overflow his other land not on the right of way,⁴ and his damages for the flowage of such other land will not be diminished because of the enhanced value given by the road to his land, in common with others in the vicinity.⁵ But by virtue of such a grant the corporation would be authorized to extend ditches from its culverts in the grantor's land, and beyond the limits of the location, or to deepen and widen the channel of a watercourse beyond such limits, when these acts are necessary to prevent the flooding and washing away of the land and to preserve the road from damage.⁶ A railroad being a public highway, the doctrine of dedication or of estoppel *in pais* applies to the right of way therefor. Where a land-owner verbally gave to a railroad company the right of way over his premises,

128; *Easterbrook v. Erie Railway Co.*, 51 Barb. 94; *Selma Railroad Co. v. Keith*, 53 Ga. 178.

¹ *Cott v. Lewiston Railroad Co.*, 36 N. Y. 214; *Hatch v. Vermont Central Railroad Co.*, 25 Vt. 49. See *Denslow v. New Haven Co.*, 16 Conn. 98.

² *Stodghill v. C. B. & Q. R. Co.*, 43 Iowa, 26; *Young v. Chicago Railway Co.*, 28 Wis. 171; *Baltimore Railroad Co. v. Magruder*, 34 Md. 79.

³ *Pugh v. Golden Valley Railway Co.*, 12 Ch. D. 274; 15 Ch. D. 330.

⁴ *Norris v. Vermont Central Railroad Co.*, 28 Vt. 99; *St. Louis Railway Co. v. Morris*, 35 Ark. 622; *Chicago Railroad Co. v. Carey*, 90 Ill.

514; *Jacksonville Railroad Co. v. Cox*, 91 Ill. 500. See *Hutchinson v. Chicago Railway Co.*, 37 Wis. 582; *Lawrence v. Great Northern Railway Co.*, 20 L. J. N. S. (Q. B.) 293.

⁵ *Ibid.* A purchaser of a mill cannot sue on a covenant made by a railroad company with its former owner to dig a new channel for the mill stream, if the covenant was already broken at the time of the purchase. *Junction Railroad Co. v. Sayers*, 28 Ind. 318.

⁶ *Babcock v. Western Railroad*, 9 Met. 553. *Contra*, under condemnation proceedings as to the right to dig ditches. *State v. Armell*, 8 Kansas, 288.

free of charge, if it would construct ditches to carry off water, and the road was constructed and the ditches dug, it was held that, after the lapse of seventeen years, the land-owner was to be regarded as having dedicated the right of way to the public use, and that the company had acquired a vested right thereto, which was not divested by its failure to maintain sufficient ditches.¹

§ 257. A railroad company is liable in damages if an excavation made for its road drains a well or spring on land adjacent to but not crossed by its line;² if the road injuriously affects a right of flowage,³ or a landing,⁴ or causes injury to crops;⁵ if it is constructed through a mill-pond which the legislature has authorized to be raised in a navigable river, although the conditions of the statute giving such authority have not been complied with;⁶ or if it removes a natural barrier which is not on the land taken, but which protects it from floods in a neighboring river, even after the land-owner has released all damages on account of the construction of the road through his land.⁷ If a canal company, under the power granted to take land by paying

¹ *Texas Railway Co. v. Sutor*, 56 Texas, 496.

² *Parker v. Boston & Maine Railroad*, 3 Cush. 107; *Aldrich v. Cheshire Railroad Co.*, 21 N. H. 359; *Peoria Railroad v. Bryant*, 57 Ill. 473. As to the right of a railway company to appropriate a spring of water, which is private property, to supply a tank, see *Strohecker v. Alabama Railroad Co.*, 42 Ga. 509.

³ *Davidson v. Boston & Maine Railroad*, 3 Cush. 91; *Hot Spring Railway Co. v. Tyler*, 36 Ark. 205.

⁴ *Railroad Co. v. Schurmeir*, 7 Wall. 272; *ante*, § 255.

⁵ *Chicago Railroad Co. v. Carey*, 90 Ill. 514; *Houston Railroad Co. v. Knapp*, 51 Texas, 592.

⁶ *White v. South Shore Railroad Co.*, 6 Cush. 412. In Pennsylvania, the right given by the act of March

23, 1803, to construct a mill-dam in a navigable stream, is a revocable license, and the mill-owner cannot recover for a subsequent interference with this right by the construction of a railroad under legislative authority. *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Bigler v. Antes*, 21 Penn. St. 288; *New York Railroad Co. v. Young*, 33 Penn. St. 175; *West Branch Canal Co. v. Mulliner*, 68 Penn. St. 357.

⁷ *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504; *Delaware Canal Co. v. Lee*, 22 N. J. 243. *Contra*, *Alexander v. Milwaukee*, 16 Wis. 247, which appears to be now overruled. See *Arimond v. Green Bay Co.*, 31 Wis. 316; *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

the value thereof, pays for a definite quantity to be overflowed by a dam and works to be erected by them, and the works when erected cause more land to be overflowed than was paid for, the land-owner may maintain an action therefor, even though he fails to prove satisfactorily any raising of the dam.¹ And if such a company enters upon land before acquiring title thereto, either under their charter or by the assent of the land-owner, and erects dams and works necessary for its own purposes, and the land, with the works so constructed, is afterwards conveyed by the owner to the company, the latter is not thereby exempted from liability to an action for damages to other land of the same owner from the want of proper care and skill in the construction or repair of the works.² A railroad corporation which is authorized to construct its road across the pond of a mill corporation, formed by damming a natural stream, is bound to so construct the road as to permit the passage of the waters both of the stream and the pond; and a joint action of tort for the entire injury may be maintained against both corporations, if the negligence of both combined to produce the injury.³

§ 258. A railroad company, or other corporation acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passage-ways for the water through its bridges and embankments.⁴ It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods;⁵ if without negligence an accumulation of water is

¹ *Morris Canal Co. v. Seward*, 23 N. J. 219; *Den v. Morris Canal Co.*, 24 N. J. 588; *Plum v. Morris Canal Co.*, 2 Stock. 257.

² *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; 28 Id. 97; *Trenton Water Power v. Raff*, 36 N. J. L. 335; *Lehigh Valley Railroad v. McFarlan*, 43 N. J. L. 615; *Valentine v. Central Railroad Co.*, 29 N. J. L. 60, 561.

³ *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491.

⁴ *Bellinger v. New York Central Railroad Co.*, 23 N. Y. 42.

⁵ *Pittsburgh Railway v. Gilleland*, 56 Penn. St. 445; *Bellinger v. New York Central Railroad Co.*, 23 N. Y. 42; *Houston Railroad Co. v. Parker*, 50 Texas, 330. So of a bridge, drain, or gutter maintained by a city. *Sprague*

set free by the breaking of a culvert in an embankment and the land below is flooded;¹ if it has taken reasonable precautions in constructing a bridge across a stream to prevent unnecessary damage to the adjacent lands by flooding those which are above,² or washing away the banks of those below;³ if the road is constructed without a culvert across a cranberry marsh, one side of which afterwards becomes dry;⁴ if, in a case of strict necessity, it closes a watercourse and floods other portions of the land than the part which it has taken;⁵ if it causes lands to be flowed by the necessary and proper elevation of its road-bed on its own land and not in the channel of the stream;⁶ nor is it liable for interest on the damages annually sustained by the plaintiff.⁷

§ 259. If a railroad embankment is so constructed as to divert the water of a stream from its natural channel, the injury to a riparian proprietor below is a permanent one, and if he recovers judgment, it is a bar to future actions for the same cause, although the jury were erroneously instructed in that action not to consider future injuries by reason of the maintenance of the embankment.⁸ So, a recovery of prospective damages, in an action for so constructing the road as to unnecessarily wash away the plaintiff's land by turning the current of the stream against it, is a bar to an action for subsequent damage, though caused by an unusual freshet.⁹ If a railroad company commits a trespass by digging a ditch on another's land, it does not acquire the right to re-enter and fill up the ditch. The continued exist-

v. Worcester, 13 Gray, 193; *Allen v. Chippewa Falls*, 52 Wis. 430; *Illinois Central Railroad Co. v. Bethel*, 11 Brad. (Ill.) 17.

¹ *Mills v. Greenville Railroad Co.*, 13 S. C. 97.

² *Mellen v. Western Railroad*, 4 Gray, 301.

³ *Ante*, § 248 *a*.

⁴ *Lyon v. Green Bay Railway Co.*, 42 Wis. 538; *Old Colony Railroad Co. v. Miller*, 125 Mass. 1.

⁵ *Johnson v. Atlantic Railroad Co.*,

35 N. H. 569; *Mason v. Kennebec Railroad*, 31 Maine, 217.

⁶ *Moyer v. New York Central Railroad Co.*, 88 N. Y. 351.

⁷ *Lamar v. Charlotte Railroad Co.*, 10 S. C. 476.

⁸ *Stodghill v. C. B. & Q. R. Co.*, 53 Iowa, 341; *Powers v. Council Bluffs*, 45 Iowa, 652. See *Great Lacey Mine Co. v. Clague*, 4 App. Cas. 115.

⁹ *Fowle v. New Haven Co.*, 112 Mass. 334; 107 Mass. 352; *ante*, § 210.

ence of the ditch is not a continuing trespass, and if, after the recovery of a judgment for the injury, new and unforeseen damage results, this does not give a new cause of action.¹ If a railway embankment ponds back the water on the plaintiff's land, doing injury to a certain amount, and the water would have reached the plaintiff's land in another way had the embankment not been constructed, but would have done damage to a less amount, the plaintiff is entitled to recover only the difference between the two amounts.² A railroad corporation is required to pay for injured works as it finds them, and not for increased works, but if the road causes injury to an unused surplus water power it is liable therefor at the market value of the water power for any useful purpose.³

§ 260. A city or town which constructs a street across a watercourse without proper culverts or drains,⁴ or which negligently constructs or maintains the bridges or culverts in a highway across a natural stream, so as to cause the water to flow back upon and injure the land of another, is liable to an action of tort to the same extent that any corporation or individual would be liable for doing similar acts.⁵ So, if a municipal corporation changes the grade of a street and thereby diverts a natural stream,⁶ or causes the drainage to flow into a mill-race and corrupt the water,⁷ it is liable to an action unless a mode of assessing the damages is provided by statute. It is important to distinguish between natural

¹ *Kansas Pacific Railway v. Muhlman*, 17 Kansas, 224. See *Cumberland Canal v. Hitchins*, 65 Maine, 140.

² *Workman v. Great Northern Railway Co.*, 32 L. J. N. S. (Q. B.) 279.

³ *Dorlan v. East Brandywine Railroad Co.*, 46 Penn. St. 520; *Haslam v. Galena Railroad*, 64 Ill. 353; *Young v. Harrison*, 17 Ga. 30; 9 Ga. 359; *Patterson v. Boom Co.*, 3 Dillon, 465; *Willamett Falls Co. v. Kelly*, 3 Oregon, 99.

⁴ *Spelman v. Portage*, 41 Wis. 144.

⁵ *Anthony v. Adams*, 1 Met. 284,

285; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 Gray, 353; *Sprague v. Worcester*, 13 Gray, 193; *Wheeler v. Worcester*, 10 Allen, 591; *Hill v. Boston*, 122 Mass. 358; *Drew v. Westfield*, 124 Mass. 461; *Barns v. Hannibal*, 71 Mo. 449; *Mootry v. Danbury*, 45 Conn. 550; *Haynes v. Burlington*, 38 Vt. 350; *Stone v. Augusta*, 46 Maine, 127.

⁶ *Helen v. Thompson*, 29 Ark. 569.

⁷ *Columbus v. Hydraulic Woolen Mills Co.*, 33 Ind. 435.

streams, flowing within defined banks, and surface water, for the powers of a municipality are much greater with respect to the latter than the former.¹ It is liable when, without express legislative powers, changing what would otherwise be the legal rights of the parties, it deprives others of their rights in a natural watercourse, or floods their lands by insufficient passage ways, although the watercourse may not form a natural stream.² But it would not necessarily be liable for similar injuries caused by surface water.³ If the land-owner opens an artificial watercourse across a highway already established through his land, he is bound to maintain a way for the use of the public over the watercourse, but the public in locating a highway, cannot shut up a watercourse, whether artificial or natural, but may make a way over it by means of bridges.⁴ A town is not responsible for backwater caused by an obstruction placed in a culvert by a mere wrongdoer.⁵

§ 261. When the legislature confers upon a municipal corporation authority to lay out and construct common sewers and drains, and provision is made by statute for the assessment, under special proceedings, of damages to persons whose estates are thereby injured, an action at law or bill in equity may be maintained by an individual suffering special damage from the nuisance, if caused by an excess of the powers granted, or by negligence in the mode of carrying out the system legally adopted, or omission to take due

¹ *Helena v. Thompson*, 29 Ark. 569, 574.

² *Rose v. St. Charles*, 49 Mo. 509; *Burton v. Chattanooga*, 7 Lea (Tenn.) 739; *Allentown v. Kramer*, 73 Penn. St. 406. A city which attempts to change the channel of a stream, must substantially comply with the requirements of its charter. *McKernan v. Indianapolis*, 38 Ind. 223.

³ *Ibid.*; *Pflegar v. Hastings Railway Co.*, 28 Minn. 510.

⁴ *Perley v. Chandler*, 6 Mass. 454; *Lowell v. Locks & Canals*, 104 Mass.

18; *Woodruff v. Neal*, 28 Conn. 165; *Moran v. McClearns*, 63 Barb. 185; *Woodring v. Fords Township*, 28 Penn. St. 355; *Fleming's Appeal*, 65 Penn. St. 444; *Merrill v. Kalamazoo*, 35 Mich. 211; *Nobles v. Langly*, 66 N. C. 287; *Bolling v. Mayor*, 3 Rand. 563; *Eyber v. County Commissioners*, 49 Md. 257.

⁵ *Peck v. Ellsworth*, 36 Maine, 393; *Steele v. South Eastern Railway Co.*, 16 Q. B. 550; *Hoagland v. Sacramento*, 52 Cal. 142.

precautions to guard against the consequences of its operation;¹ but not for injuries which are caused by a defect or insufficiency in the plan or system of drainage adopted under the authority conferred by the legislature, or which are the necessary result of the exercise of the authority so conferred.² The corporation is liable in an action of tort, if, without authority of law, it collects surface or other waters in a public sewer, and empties them upon the land of an individual to his injury,³ either immediately or by the force of gravitation;⁴ if it drains water through sewers and drains into a canal owned by a private corporation and thereby causes injury to the canal;⁵ if, in like manner, it obstructs a mill-race;⁶ if it discharges mud and filth into a private dock so as to interfere with the access thereto and the right to lay vessels thereat;⁷ if it constructs the sewer

¹ *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 13; 109 Mass. 197; *Washburn & Moen Manuf. Co. v. Worcester*, 116 Mass. 458; *Hill v. Boston*, 122 Mass. 358; *Ashley v. Port Huron*, 35 Mich. 296; *Mills v. Brooklyn*, 32 N. Y. 489.

² *Ibid.*

³ *Cator v. Board of Works*, 34 L. J. (Q. B.) 74; *Winn v. Rutland*, 52 Vt. 481; *Ashley v. Port Huron*, 35 Mich. 296; *Rowe v. Portsmouth*, 56 N. H. 291; *Rochester v. White Lead Co.*, 3 N. Y. 463; *Mayor v. Bailey*, 2 Denio, 433; *Lewenthal v. Mayor*, 61 Barb. 511; *Bradt v. Albany*, 5 Hun, 591; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132; *Jacksonville v. Lambert*, 62 Ill. 519; *Hildreth v. Lowell*, 11 Gray, 345; *Manning v. Lowell*, 130 Mass. 21; *Lewenthal v. New York*, 5 Lans. 532; *Pettigrew v. Evansville*, 25 Wis. 223; *Alexander v. Milwaukee*, 16 Wis. 248; *Smith v. Milwaukee*, 18 Wis. 63; *Vincennes v. Richards*, 23 Ind. 381; *Weis v. Madison*, 75 Ind. 241; *Niles' Works v. Cincinnati*, 2 Disney, 400; *Cotes v. Davenport*, 9 Iowa, 227; *Kobs v. Minneapolis*, 22 Minn. 159; *Simmer v. St.*

Paul, 23 Minn. 408; *Phinzy v. Augusta*, 47 Ga. 290; *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654. In such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it was intended, but it is the doing of a wrongful act, causing a direct injury to the property of another outside the limits of the public work. *Hill v. Boston*, 122 Mass. 358.

⁴ *Woodward v. Worcester*, 121 Mass. 245.

⁵ *Locks and Canals v. Lowell*, 7 Gray, 223.

⁶ *Columbus v. Woollen Mills*, 33 Ind. 435; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433.

⁷ *Haskell v. New Bedford*, 108 Mass. 208; *Clark v. Peckham*, 9 R. I. 455; *Richardson v. Boston*, 19 How. 263. A city is also liable for diverting a natural stream which deposits sand and earth in front of the plaintiff's wharf and impairs its value. *Barron v. Baltimore*, 4 Am. Jur. 203; *ante*, § 123.

unskillfully,¹ or negligently suffers it to be out of repair,² or makes a change in the structure, or has notice that such change is made by others, by means of which the passage of the water or sewage is obstructed.³ If the authorities of a city change the channel of a drain so as to throw the water flowing therein upon the land of A, A cannot obstruct the channel so as to cause the water to flow back upon the land of B lying above his own.⁴ The rule that a municipal corporation is not required to supply means of escape for drainage or sewage does not apply when the necessity for the drainage is caused by the act of the corporation itself.⁵ It is competent for the legislature to authorize a city to turn a natural stream into a sewer,⁶ and the plaintiff must show special injury to entitle him to relief beyond the statute.⁷

§ 262. Cities have been held not liable for injury to others caused by the overflow of their sewers in the following cases: where the sewer became choked with sand and mud from the streets, and it did not appear that it was liable to become obstructed under ordinary circumstances, or that the city had knowledge of the obstruction, or that there was any fault in the construction of the sewer;⁸ where the city omits to construct a sewer, or fails to make it of sufficient size, the

¹ *Winon v. Rutland*, 52 Vt. 481; *Vestry of St. Pancras, L. R.* 9 C. P. 316; *Thurston v. St. Joseph*, 51 Mo. 510; *Fleming v. Manchester*, 44 L. T. N. S. 517; *Simmer v. St. Paul*, 23 Minn. 408.
² *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216; *Lewenthal v. New York*, 5 Lans. 532; 61 Barb. 511; *Fleming v. Manchester*, 44 L. T. 517; *Jacksonville v. Lambert*, 62 Ill. 519.

² *Ibid.*; *McCarthy v. Syracuse*, 46 N. Y. 194; *Barton v. Syracuse*, 36 N. Y. 54; 37 Barb. 292; *New York v. Furze*, 3 Hill, 612; *Gilman v. Laconia*, 55 N. H. 130; *Lloyd v. New York*, 5 N. Y. 369; *Hudson v. New York*, 9 N. Y. 163; 5 Sand. 289; *Wilson v. New York*, 1 Denio, 595; *South Bend v. Paxton*, 67 Ind. 228; *Hammond v.*

³ *Nims v. Mayor*, 59 N. Y. 500; *Donohue v. New York*, 3 Daly, 65; *Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

⁴ *Amick v. Tharp*, 13 Gratt, 564.

⁵ *Byrnes v. Cohoes*, 67 N. Y. 204.

⁶ *Butler v. Worcester*, 112 Mass. 541.

⁷ *Washburn & Moen Co. v. Worcester*, 116 Mass. 458; *Workman v. Worcester*, 118 Mass. 168.

⁸ *Smith v. Mayor*, 66 N. Y. 295; 4 Hun, 637; *Wheeler v. Worcester*, 10 Allen, 591.

duty of determining the location and dimensions of sewers being in its nature judicial;¹ where the injury is caused by an error of judgment, as to the required capacity of the sewer, on the part of a competent engineer employed by the city;² where extraordinary and exceptional floods cause the overflow, and the structure is of sufficient capacity for all ordinary purposes and for such floods as have previously occurred;³ where a public sewer overflows by the negligence of the city, but discharges through a private drain of the plaintiff which he has connected with the sewer without the permit required by an ordinance,⁴ or when surface water flows into a cellar which is not connected by a drain with the public sewer.⁵

¹ *Mills v. Brooklyn*, 32 N. Y. 489; *Flagg v. Worcester*, 13 Gray, 601; *Carr v. Northern Liberties*, 35 Penn. St. 324; *Little Rock v. Willis*, 27 Ark. 572; *Fair v. Philadelphia*, 88 Penn. St. 309; *Collins v. Philadelphia*, 93 Penn. St. 272; *Harper v. Milwaukee*, 30 Wis. 365. This rule is not applicable where the necessity for the drainage or outlet is caused by the act of the corporation itself, as by diverting water and throwing it upon the plaintiff's premises without providing an outlet. *Byrnes v. Cohoes*, 67 N. Y. 204.

² *Van Pelt v. Davenport*, 42 Iowa, 308. But see *Helena v. Thompson*,

29 Ark. 569; *Atchison v. Challis*, 9 Kans. 612; *Detroit v. Corey*, 9 Mich. 165; *Philadelphia Railroad Co. v. Anderson*, 94 Penn. St. 351. In *Van Pelt v. Davenport*, just cited, held also that the city is not released by the fact that the money for the construction of the culvert was appropriated by the board of supervisors of the county.

³ *Madison v. Ross*, 3 Ind. 236; *Coldwater v. Tucker*, 36 Mich. 474; *Powers v. Council Bluffs*, 50 Iowa, 197.

⁴ *Ranlett v. Lowell*, 126 Mass. 431. See *Terry v. New York*, 8 Bosw. 504.

⁵ *Barry v. Lowell*, 8 Allen, 127.

CHAPTER IX.

SURFACE AND SUBTERRANEAN WATERS. — MINES.

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- 263, 264. Surface water defined.
- 265. The common law as to such water.
- 266. The rule of the civil law.
- 267. Rights in surface water not analogous to rights in watercourses.
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- 272, 273. Municipal and railroad corporations have no greater rights than individuals at common law.
- 274. Land-owner may drain into a watercourse by artificial channels.
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SECTION.

290. Malicious motive, in draining a neighbor's well or percolating waters, may afford a cause of action.
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§ 263. Water spread over the surface of land, or percolating the soil beneath the surface, if flowing in no definite channel, does not constitute a watercourse, and is not subject to the principles of law regulating the rights of riparian owners. Mere surface water may be said to form a watercourse at the point where it begins to have a reasonably well-defined channel with bed and banks or sides, although the stream itself may be very small, and the water may not flow continuously;¹ and surface water ceases to be such after entering within the banks of a watercourse.² By the common law, no rights can be claimed *jure naturae* in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others. If the gist of a cause of action is the diversion of the water of a brook or watercourse, this is an essential and material averment which the plaintiff must prove in order to maintain his

¹ *Swett v. Cutts*, 50 N. H. 439; *Morrison v. Railroad Co.*, 67 Maine, 353; *Wagner v. Long Island Railroad Co.*, 5 Thomp. & C. (N. Y.) 163; 2 Hun, 633; *Earle v. De Hart*, 12 N. J. Eq. 280; *Shields v. Arndt*, 3 Green Ch. 234; *Carlisle v. Cooper*, 21 N. J. Eq. 576, 581; 19 Id. 256; *Curtis v. Ayrault*, 47 N. Y. 73; *Livingston v. McDonald*, 21 Iowa, 160; *Boynton v. Gilman*, 53 Vt. 17; *Thunder Bay Booming Co. v. Speechley*, 31 Mich. 336; *Wadsworth v. Smith*, 11 Maine, 278; *Gibbs v. Williams*, 25 Kansas, 214; *Palmer v. Waddell*, 22 Kan. 352; *Schlichler v. Phillipy*, 67 Ind. 201; *Hoyt v. Hudson*, 27 Wis. 656; *Fryer v. Warne*, 29 Wis. 511; *Eulrich v. Richter*, 37 Wis. 226; 41 Wis. 318; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Barnes v. Sabron*, 10 Nev. 217; *ante*, § 41; *McKinley v. Union Co.*, 42 Wis. 203; 47 Wis. 324.

² *Id.*; *Jones v. Hannovan*, 55 Mo. 462.

action; and it is a variance to show that the defendant's act drained mere surface water, or water from a swamp, without any proof to sustain the allegation of a diversion of water from a brook.¹

§ 264. A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel.² In broken regions of country, intersected by long, deep ravines, or surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melting snow rush rapidly, often attaining the volume of a small river, and usually following a well-defined channel, the common-law rules applicable to ordinary surface water do not necessarily apply. In many respects such waters partake more of the nature of natural streams than of ordinary surface water, and, to a certain extent, are governed by the same rules; and no one has a right to obstruct or divert such waters so as to cast them upon the property of others to their injury.³ But in general, in order to constitute a watercourse, the channel and banks formed by the flowing of the water must present to the eye, on a casual glance, the unmistakable evidences of the frequent action of running water.⁴

§ 265. According to the rule of the common law, which is accepted in England, Massachusetts, Maine, Vermont, New

¹ Griffith v. Jenkins, 2 Allen, 589; Gibbs v. Williams, 25 Kans. 214; Munkers v. Kansas City Railroad Co., 60 Mo. 334; Drewett v. Sheard, 7 C. & P. 465; Dudden v. Guardians of the Poor, 11 Exch. 627; Rex v. Trafford, 8 Bing. 204; Staffordshire Canal v. Birmingham Canal, L. R. 1 H. L. 254, 272; Rochdale Canal v. Radcliffe, 18 Q. B. 287; Reynolds v. McArthur, 2 Peters, 417, 438; Bangor v. Lansil, 51 Maine, 521; Arnold v. Foot, 12 Wend. 330; Earle v. De Hart, 12 N. J. Eq. 283; Kauffman v. Griesemer, 26 Penn. St. 407.

² Macomber v. Godfrey, 108 Mass. 219; Gillett v. Johnson, 30 Conn. 180; Briscoe v. Drought, 11 Ir. C. L. 250; Munkres v. Kansas City Railroad Co., 72 Mo. 514.

³ Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483; Bowlsley v. Speer, 31 N. J. L. 351; McClure v. City of Red Wing, 28 Minn. 186.

⁴ Palmer v. Waddell, 22 Kans. 352;

York, New Hampshire, Rhode Island, New Jersey, and Wisconsin, a land owner may appropriate to his own use or expel from his land all mere surface water or superficially percolating waters, in draining his soil for agriculture,¹ in collecting it for domestic purposes,² or for the sole purpose of depriving an adjoining owner of it,³ and any person, from whose land it is withheld or whose water supply is depleted, will, in the absence of an express grant,⁴ have no right of action for such diversion or obstruction.⁵ In New Hampshire, a land-owner may disturb the natural drainage only to the degree necessary in the reasonable use of his own land, and what is such reasonable use is ordinarily for the jury to determine under appropriate instructions.⁶

§ 266. By the civil law, the lower of two adjacent estates owes a servitude to the upper to receive all the natural drainage; and the lower owner cannot reject nor can the upper withhold the supply, although either, for the sake of improving his land, according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow of the water.⁷ Interference with the natural flow of surface water

¹ *Greatrex v. Hayward*, 3 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *Buffum v. Harris*, 5 R. I. 243; *Bethall v. Seifert*, 77 Ind. 302; *Cairo Railroad Co. v. Houry*, Id. 361.

² *Rawstron v. Taylor*, 11 Exch. 369.

³ *Chatfield v. Wilson*, 28 Vt. 49.

⁴ *Rawstron v. Taylor*, 11 Exch. 369.

⁵ *Greatrex v. Hayward*, 3 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *Barkley v. Wilcox*, 86 N. Y. 140; *Buffum v. Harris*, 5 R. I. 243; *Chatfield v. Wilson*, 28 Vt. 49. See *Ennor v. Barwell*, 2 Giff. 410, 423 *et seq.*; *Curtis v. Ayrault*, 47 N. Y. 73.

⁶ *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 459. See *Hoyt v. Hudson*, 27 Wis.

656, and *Hurdman v. North Eastern Railway*, 3 C. P. D. 168, 173, as to reasonable use. See also *Williamson v. Lock's Creek Canal Co.*, 76 N. C. 478.

⁷ *Martin v. Jett*, 12 La. 561; *Latimore v. Davis*, 14 La. 161; *Hays v. Hays*, 19 La. 351; *Adams v. Harrison*, 4 La. Ann. 165; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hooper v. Wilkinson*, 15 La. Ann. 497; *Barrow v. Laundry*, 15 La. Ann. 681; *Minor v. Wright*, 16 La. Ann. 151; *Gillis v. Nelson*, Id. 275; *Bowman v. New Orleans*, 27 La. Ann. 502; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Martin v. Riddle*, 26 Penn. St. 415 n; *Miller v. Laubach*, 47 Penn. St. 147; *Hayes v. Hickelman*, 68 Penn. St. 324; 8 *Watts & S.* 40; *Butler v. Peck*, 16 Ohio St. 334; *Tootle v. Clifton*, 22 Ohio St. 247; *Gillham v. Madison*

is regarded as a nuisance, for which nominal damages may be recovered without proof of actual damage.¹ The courts of Pennsylvania, Illinois, North Carolina, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri.²

§ 267. A land-owner may change the grade of its surface, and if, in the absence of grant, prescription, or mutual stipulation,³ mere surface water or the natural drainage is displaced, obstructed, or caused to accumulate upon adjoining land,⁴ or upon a street or highway,⁵ no right of action arises.⁶ In *Adams v. Walker*,⁷ the Supreme Court of Connecticut decided that a person cannot grade his lot and thereby turn surface water upon another's land to prevent it from flowing into his well, or for any other lawful purpose. But the general common-law rule⁸ is that "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the

County Railroad Co., 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Hicks v. Silliman*, 93 Ill. 255; *Overton v. Sawyer*, 1 Jones (Law) 308; *Porter v. Durham*, 74 N. C. 767; *Laumier v. Francis*, 23 Mo. 181; *Jones v. Hannovan*, 55 Mo. 462; *Livingston v. McDonald*, 21 Iowa, 160; *Ogburn v. Connor*, 46 Cal. 346; *Brown v. McAllister*, 39 Cal. 573; *Goldsmith v. Elsas*, 53 Ga. 186; *McCormick v. Kansas City Railroad Co.*, 70 Mo. 359.

¹ *Ibid.*; *Tootle v. Clifton*, 22 Ohio St. 247.

² *Ibid.*; *Barkley v. Wilcox*, 86 N. Y. 140, 145.

³ *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Dickinson v. Worcester*, 7

Allen, 19; *Rawstron v. Taylor*, 11 Exch. 369; *Bigelow, C. J.*, in *Gannon v. Hargadon*, 10 Allen, 106.

⁴ *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Goodale v. Tuttle*, 29 N. Y. 451.

⁵ *Bangor v. Lansil*, 51 Maine, 521.

⁶ *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Morrill v. Hurley*, 120 Mass. 99; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Bangor v. Lansil*, 51 Maine, 521; *Goodale v. Tuttle*, 29 N. Y. 451.

⁷ 34 Conn. 466.

⁸ *Gannon v. Hargadon*, 10 Allen, 106, 109; *ante*, § 265.

surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." In *Hurdman v. North Eastern Railway*,¹ it was held that a claim that rain-water, by reason of the defendant raising the surface of its land by earth deposits, made its way through the defendant's wall into the adjoining house of the plaintiff and caused substantial damage, disclosed a good cause of action. Cotton, L. J., in delivering the judgment of the court of appeal, distinguished *Wilson v. Waddell*² as applying to damage resulting from surface water in the natural user of land, and said that "if any one, by artificial erection on his own land, causes water, even though arising from natural rainfall only, to pass into his neighbor's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured." It is a question of negligence whether one who opens a covered drain in his land is liable for injury to his neighbor, caused by the sudden overflow of the drain after he had reclosed it.³

§ 268. According to the rule established in Massachusetts and New Jersey, an owner of land may erect structures upon it of any size, height, or depth, irrespective of their effect upon mere surface water or the natural drainage.⁴ In states where the rule of the civil law prevails, it appears that the owner of city property may be held to a stricter liability respecting surface water than the owner of an estate in an agricultural district.⁵ *Bentz v. Armstrong*,⁵ in Pennsylvania,

¹ 3 C. P. D. 168. See *Broder v. Saillard*, 2 Ch. D. 692, 700.

² 2 App. Cas. 95.

³ *Rockwood v. Wilson*, 11 Cush. 221.

⁴ *Parks v. Newburyport*, 10 Gray, 28; *Bates v. Smith*, 100 Mass. 181; *Bowlsby v. Speer*, 2 Vroom, 351; *Gannon v. Hargadon*, 10 Allen, 106; *Bellows v. Sackett*, 15 Barb. 96, decided that an owner of a house,

from the roof of which rain water fell through a broken gutter upon his own land, and injured the foundations of an adjoining house, was liable.

⁵ *Bentz v. Armstrong*, 8 W. & S. 40; *Young v. Leedom*, 67 Penn. St. 351; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Livingston v. McDonald*, 21 Iowa, 160; *Cincinnati Railroad Co. v. Ahr*, 2 Cincin. 504; *Whitney v. Sanders*, 3 Pittsburgh, 220; *Phinzy v.*

decided that the owner of a city lot must so improve it as to prevent its surface water from annoying an adjoining owner. It is held in Illinois, that the owner of an inferior estate in the country is not bound to receive the surface water coming to his land in larger quantities or at different times than it would come but for the voluntary act of his neighbor, and that the collecting and discharging of surface water upon such estate in streams is a continuing trespass, for which successive actions will lie.¹ An owner of vacant and unimproved city lots is not liable to an action for his failure to prevent mere surface water, accumulating thereon from natural causes, from passing thence upon the land of an adjoining proprietor to his injury,² although the washings of streets and deposits of garbage by third persons may have caused the land to slope in that direction.³ If the owner of a city lot builds a house on it, damming up surface water on an adjacent lot so as to cause injury to the house, he cannot recover.⁴ Such an owner may be obliged, by reason of changes and improvements in the surrounding lots, to care for accumulations of surface water thereby caused on his lot.⁵ An owner of a city lot, on which surface water accumulates by the raising of a street and the adjacent land and became stagnant, is not liable for the nuisance.⁶

§ 269. Cities and towns have the same control over streets, highways, and public places, in respect to surface water, as private owners of land. If a city or town so constructs or changes the grade of a street or highway as to cause the surface water, naturally collecting thereon in rain and snow, to flow upon the lands of adjoining owners, no liability arises.⁷

Augusta, 47 Ga. 260; *Freudenstein v. Heine*, 6 Mo. App. 287; *Gormley v. Sanford*, 50 Ill. 158; *Whitney v. Sanders*, 3 Pittsburgh, 226.

¹ *Mellor v. Pilgrim*, 3 Brad. (Ill.) 476; 7 Id. 306; *Hicks v. Silliman*, 93 Ill. 255. See *Templeton v. Voshloe*, 72 Ind. 134; *Cairo Railroad Co. v. Stevens*, 73 Ind. 278.

² *Morrill v. Hurley*, 120 Mass. 99; *Vanderwiele v. Taylor*, 65 N. Y. 341.

³ *Ibid.*

⁴ *Doerbaum v. Fischer*, 1 Mo. App. 149.

⁵ *Thomas v. Kenyon*, 1 Daly, 132.

⁶ *Barry v. Commonwealth*, 2 Duv. (Ky.) 95.

⁷ *Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291;

But the land-owner may, by any act or structure on his own land, prevent the water coming upon his land from a highway through a drain or culvert.¹ It has been held that a city, in changing the grade of a street, and thereby causing the water accumulating thereon to flow upon adjacent private property, will not be liable for damages thereby caused, unless the work was done in an unskilful and negligent manner,² or the adjacent owner could not have prevented the injury at moderate expense or by ordinary efforts.³

§ 270. If a city or town makes provision for carrying off the surface water of its streets and highways, which proves insufficient, and such water flows over upon the land of an adjoining proprietor to his injury, he will have no right of action.⁴ A city or town in constructing or raising the grade of a street or highway is not bound to provide means of escape for accumulations of mere surface water thereby caused on adjacent land, nor is it liable for such obstruction.⁵ It is not liable for the obstruction of surface water by a street horse-railroad track, properly authorized, constructed, and operated.⁶ A city, which, in the construction of a street,

Gray, J., in *Emery v. Lowell*, 104 Mass. 13, 16; *Hubbard v. Webster*, 118 Mass. 599; *Wakefield v. Newell*, 12 R. I. 75; *Lynch v. New York*, 76 N. Y. 60; *Imler v. Springfield*, 55 Mo. 119; *Alden v. Minneapolis*, 24 Minn. 254; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Roll v. Augusta*, 34 Ga. 326.

¹ *Franklin v. Fisk*, 13 Allen, 211.

² *Muscatine v. Wallace*, 4 G. Greene (Iowa) 373; *Ellis v. Iowa City*, 29 Iowa, 229; *Russell v. Burlington*, 30 Iowa, 262; *Damon v. Lyons City*, 44 Iowa, 276.

³ *Simpson v. Keokuk*, 34 Iowa, 568; *Bartle v. Des Moines*, 38 Iowa, 414.

⁴ *Barry v. Lowell*, 8 Allen, 127; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 480; *Kavanagh v. Brooklyn*, 38 Barb. 50; *Fair v. Philadelphia*, 83 Penn. St. 300; *Carr*

v. Northern Liberties, 35 Penn. St. 324; *Alden v. Minneapolis*, 24 Minn. 254; *Atchison v. Challis*, 9 Kan. 603. So, if such water results from extraordinary storm. *Allen v. Chippewa Falls*, 52 Wis. 430. See *Leavenworth v. Casey*, *McCahon* (Kan.) 125, 132; *Logansport v. Wright*, 25 Ind. 512; *Indianapolis v. Huffer*, 30 Ind. 235; *St. Louis v. Gurno*, 12 Mo. 414.

⁵ *Dickinson v. Worcester*, 7 Allen, 19; *Hoyt v. Hudson*, 27 Wis. 656; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Wilson v. New York*, 1 Denio, 595; *Gould v. Booth*, 66 N. Y. 62; *Lynch v. Mayor*, 76 N. Y. 60. See *Carr v. Northern Liberties*, 35 Penn. St. 324.

⁶ *Swenson v. Lexington*, 69 Mo. 157. See *Damour v. Lyons City*, 44 Iowa, 276, *contra*.

made a fill across a natural drain for surface water, and flooded an adjoining owner's property, was held liable in Kentucky.¹ A municipal corporation is not liable for the non-exercise of its powers to construct gutters or other means of draining surface water;² and it may abandon a sewer or drain, constructed for the purpose of carrying off surface water, if it does not leave the adjoining owners in a worse position than they would be if the sewer or drain had never been made.³ In Illinois, a city is liable for insufficiency of a gutter causing surface water to overflow upon an adjacent lot,⁴ but not for the entire damage, if the owner contributed thereto by stopping up a drain.⁵ In Iowa, a city is liable for the failure to provide, when practicable, temporary means for the escape of surface water while raising the grade of a street, causing its escape upon adjoining premises.⁶

§ 271. An owner of land has no right to rid his land of surface water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor.⁷ This is alike the rule of the common and civil law;⁸ and a municipal corporation has no greater right in this respect than a private landowner.⁹ But a riparian proprietor may collect, in an artificial

¹ *Kemper v. Louisville*, 14 Bush, (Ky.) 87.

² *Lynch v. Mayor*, 76 N. Y. 60; *Mills v. Brooklyn*, 32 N. Y. 489; *Flagg v. Worcester*, 13 Gray, 601; *Roll v. Augusta*, 34 Ga. 326; *Fair v. Philadelphia*, 88 Penn. St. 309.

³ *Atchison v. Challiss*, 9 Kans. 603.

⁴ *Dixon v. Baker*, 65 Ill. 518.

⁵ *Paris v. Cracraft*, 85 Ill. 294.

⁶ *Cotes v. Davenport*, 9 Iowa, 227; *Ross v. Clinton*, 46 Iowa, 606.

⁷ *White v. Chapin*, 12 Allen, 516; *Foot v. Bronson*, 4 Lans. 47; *Hicks v. Silliman*, 93 Ill. 255; *Kauffman v. Griesemer*, 26 Penn. St. 415; *Martin v. Riddle*, 26 Penn. St. 415 n.; *Miller v. Laubach*, 47 Penn. St. 154; *Butler v. Peck*, 16 Ohio St. 334; *Livingston*

v. McDonald, 21 Iowa, 160; *Davis v. Londgreen*, 8 Neb. 43; *Porter v. Durham*, 74 N. C. 767. See *Goldsmith v. Elsas*, 53 Ga. 186; *Gillis v. Nelson*, 16 La. Ann. 275; *Sowers v. Schiff*, 15 La. Ann. 300. *Jutte v. Hughes*, 67 N. Y. 267, decided that a land-owner, who conducted from the roofs of his houses, in leaders and drains to the privies, water beyond their capacity, whereby it overflowed to the injury of an adjoining owner, was liable for his failure to prevent the overflow.

⁸ *Barkley v. Wilcox*, 86 N. Y. 148.

⁹ *Weis v. Madison*, 75 Ind. 241; *O'Brien v. St. Paul*, 25 Minn. 331. See *Noonan v. Albany*, 79 N. Y. 470; *Cumberland v. Willison*, 50 Md. 138.

channel, surface water which naturally flows from his estate into a watercourse running through or by such estate, and thereby to discharge such water into the natural stream, although the latter is thereby increased in volume.¹ This right exists only with respect to waters of which the watercourse is the natural outlet.²

§ 272. Cities and towns have no greater rights than individuals to collect in artificial channels upon their streets and highways mere surface water, distributed in rain and snow over large districts, and precipitate it upon the premises of private owners.³ So, a municipal corporation is liable for throwing water, collected in large quantities in a street or in the gutter of a street, upon the land of a private owner,⁴ unless it appears that the plaintiff could have prevented the injury by ordinary efforts or at moderate expense.⁵ In *Judge v. Meriden*,⁶ a divided court held a city not liable for the act of its street commissioner in diverting an accumulation of surface water from a street through a sidewalk upon

¹ *Ibid.*; *Waffle v. New York Central Railroad Co.*, 53 N. Y. 11; *McCormick v. Horan*, 81 N. Y. 86; *Gannon v. Hargadon*, 10 Allen, 106; *Miller v. Laubach*, 47 Penn. St. 154.

² *Ibid.*; *Tillotson v. Smith*, 32 N. H. 90; *Baltimore v. Appold*, 42 Md. 442.

³ *Plummer v. Sturtevant*, 32 Maine, 325; *Inman v. Tripp*, 11 R. I. 520; *Byrnes v. Cohoes*, 67 N. Y. 204; 5 Hun, 602; *Noonan v. Albany*, 79 N. Y. 470; *Bastable v. Syracuse*, 8 Hun, 587; *Moran v. McClearn*, 63 Barb. 185; 44 How. Pr. 30; *Sleight v. Kingston*, 11 Hun, 594; *Pettigrew v. Evansville*, 25 Wis. 223; *Pontiac v. Carter*, 32 Mich. 164; *Ashley v. Port Huron*, 35 Mich. 296; *Smith v. Milwaukee*, 18 Wis. 63; *Union v. Durkes*, 38 N. J. L. 21; *Smith v. Alexandria*, 33 Gratt. 208; *Gillison v. Charleston*, 16 W. Va. 282; *Russell v. Burlington*, 30 Iowa, 262; *Weyman v. Jefferson*, 61 Mo. 55;

Indianapolis v. Lawyer, 38 Ind. 348; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 29; *Bloomington v. Brokaw*, 77 Ill. 194; *Shawneetown v. Mason*, 82 Ill. 337; *Stack v. East St. Louis*, 85 Ill. 377; *Elgin v. Kimball*, 90 Ill. 356; *Aurora v. Love*, 93 Ill. 521; *O'Brien v. St. Paul*, 25 Minn. 331; *Phinzy v. Augusta*, 47 Ga. 260; *Lee v. Minneapolis*, 22 Minn. 13. So, if such water escapes through a break in a gutter. *Alton v. Hope*, 68 Ill. 167. *A fortiori*, if a city thus discharges foul sewage with surface water. *Winn v. Rutland*, 52 Vt. 481; *Jacksonville v. Lambert*, 62 Ill. 519.

⁴ *Byrnes v. Cohoes*, 67 N. Y. 204; *Mairs v. Manhattan Real Estate Association*, 89 N. Y. 498; *Indianapolis v. Lawyer*, 38 Ind. 348; *Damour v. Lyons City*, 44 Iowa, 276.

⁵ *Simpson v. Keokuk*, 34 Iowa, 568.

⁶ 38 Conn. 90.

adjacent private premises. A city is liable if the embankment of a street horse railroad, properly authorized, caused the surface water of a large district to flow upon adjoining premises.¹ A city cannot put in a culvert across a street, and discharge a pond of stagnant water upon adjoining premises.² In Massachusetts, one whose premises have been flooded by great quantities of surface water passing through an artificial channel, must seek his remedy under the statute.³ In *Inman v. Tripp*,⁴ in Rhode Island, the city of Providence was held liable for damages occasioned to the plaintiff's property, in exercising its power to grade its streets, by causing surface water, some of which had flowed in other streets, and some of which had collected in a pond at a distance, to be turned into the street in front of and above the plaintiff's estate, whence it ran into his cellar and well. A city is liable for an injury resulting from a defect in a street, though caused by surface water.⁵

§ 273. A railroad corporation duly authorized by law has no other or different rights regarding surface water or superficially percolating waters, and if its road-bed obstructs or diverts the natural flow of such waters, no right of action, by the common law, arises to adjoining owners of land,⁶ the

¹ *Damour v. Lyons City*, 44 Iowa, 276. See *Swenson v. Lexington*, 69 Mo. 157.

² *Kobs v. Minneapolis*, 22 Minn. 159.

³ *Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291.

⁴ 11 R. I. 520.

⁵ *Murphy v. Indianapolis*, 83 Ind. 76.

⁶ *Greeley v. Maine Railroad Co.*, 53 Maine, 200; *Morrison v. Bucksport Railroad Co.*, 67 Maine, 353; *Walker v. Old Colony Railroad Co.*, 103 Mass. 10, 16; *Wagner v. Long Island Railroad Co.*, 2 Hun, 633; 5 *Thomp. & C.* 163; *Conhocton Co. v. Buffalo Railroad Co.*, 3 Hun, 523; 5 *Thomp. & C.* 651; *Raleigh Railroad Co. v. Wicker*, 74 N. C. 220; *O'Connor v.*

Fond du Lac Railroad Co., 52 Wis. 526; *Louisville Railroad Co. v. McAfee*, 30 Ind. 291; *Clark v. Hannibal Railroad Co.*, 36 Mo. 202; *Hosher v. Kansas City Railroad Co.*, 60 Mo. 329; *Munkers v. Kansas City Railroad Co.*, 60 Mo. 334; *Atchison Railroad Co. v. Hammer*, 22 Kansas, 763. See *Waterman v. Connecticut Railroad Co.*, 30 Vt. 510; *Bagnall v. London Railroad Co.*, 31 L. J. (Exch.) 480. *Contra*, under the civil law, *Gillham v. Madison Railroad Co.*, 49 Ill. 484; *Alton Railroad Co. v. Deitz*, 50 Ill. 210; *Toledo Railway Co. v. Hunter*, 50 Ill. 325; *Shane v. Kansas Railroad Co.*, 71 Mo. 237 (a divided court); *Cincinnati Railroad Co. v. Ahr*, 2 Cincin. 504; *Indianapolis Railroad Co. v. Smith*, 52 Ind. 428; *Car-*

presumption being that the damages to which they are entitled were included in the compensation assessed.¹ The same is true where the road-bed obstructs an artificial ditch through which the natural surface water on the plaintiff's land is conducted to a river.² Under the civil-law rule, a railroad corporation is liable for causing surface water to accumulate on adjoining lands by embankments or any artificial means.³ And if a railroad, built without due legal proceedings, obstructs the passage of surface water, it will be liable to an action at the suit of the owner of the premises flooded.⁴ Damages caused by the displacement or obstruction of surface water may be included in the assessment of damages under the statute caused by the original construction of the railroad.⁵ A railroad corporation has no right by the erection of embankments, the construction of culverts, or the digging of ditches to collect and discharge unusual quantities of surface water upon adjoining lands.⁶

§ 274. The owner of land has a right to discharge the natural drainage of his land, and the surface water accumulating thereon, into a watercourse, and in so doing he may change or concentrate its flow in artificial channels, thus accelerating the flow and increasing the volume of water in

riger v. East Tennessee Railroad Co., 7 Lea, 388; *Cornish v. Chicago Railroad Co.*, 49 Iowa, 378. In *Alton Railroad Co. v. Deitz*, 50 Ill. 210, held that a horse railroad, which laid its track across a street gutter, is liable for the obstruction of surface water. See *Indianapolis Railway Co. v. Smith*, 52 Ind. 428.

¹ *Clark v. Hannibal Railroad Co.*, 36 Mo. 202; *Raleigh Railroad Co. v. Wicker*, 74 N. C. 220; *Walker v. Old Colony Railway Co.*, 103 Mass. 10.

² *O'Connor v. Fond du Lac Railway Co.*, 52 Wis. 526; *Pettigrew v. Evansville*, 25 Wis. 223.

³ *Toledo Railway Co. v. Morrison*, 71 Ill. 616.

⁴ *Adams v. Hastings Railroad Co.*, 18 Minn. 260.

⁵ *Walker v. Old Colony Railroad Co.*, 103 Mass. 1, 16; *Morrison v. Bucksport Railroad Co.*, 67 Maine, 353; *Grand Rapids Railroad Co. v. Horn*, 41 Ind. 479; *Rockford Railroad Co. v. McKinley*, 64 Ill. 338. See *Proprietors of Locks, &c. v. Nashua Railroad Co.*, 10 Cush. 385; *Hatch v. Vermont Railroad Co.*, 25 Vt. 49.

⁶ *Curtis v. Eastern Railroad Co.*, 98 Mass. 428; *Toledo Railroad Co. v. Morrison*, 71 Ill. 616; *St. Louis Railroad Co. v. Capps*, 72 Ill. 188; *Jacksonville Railroad Co. v. Cox*, 91 Ill. 500; *McCormick v. Kansas City Railroad Co.*, 57 Mo. 433; 70 Mo. 359; *Raleigh Railroad v. Wicker*, 74 N. C. 220.

the stream, provided its natural capacity is not exceeded,¹ and those whose supply is rendered more variable cannot complain.² The land-owner may, for his own convenience, cleanse and wall up a natural spring on his land if the natural flow of water therefrom in the usual channel is not so increased as to materially injure his neighbor upon whose land the water passes.³

§ 275. The owner of land may erect barriers upon it to prevent the influx of surface water, whether collected in artificial channels or not, and if such water is set back or turned aside upon the land of another, to his injury, it affords no cause of action.⁴ One cannot enter upon another's land to erect a barrier.⁵ In hilly regions, where in times of excessive rains or the melting of heavy snows large quantities of water are forced to seek an outlet through gorges or narrow valleys, the above rule should probably be modified, such waters having some of the characteristics of watercourses.⁶ *Martin v. Riddle*,⁷ in Pennsylvania, decided that a person could not obstruct an artificial flow of surface water and turn it upon a third person who is not responsible for the flow.

§ 276. In those States where the influence of the civil law is felt, an owner of land cannot obstruct or alter the natural flow of surface water which his estate owes a servitude to receive.⁸ If the owner of the dominant estate drains his land

¹ *Wheeler v. Worcester*, 10 Allen, 591; *McCormick v. Horan*, 81 N. Y. 86; *Williams v. Gale*, 3 H. & John. 231; *Miller v. Laubach*, 47 Penn. St. 154; *Foot v. Bronson*, 4 Lans. 47; *Treat v. Bates*, 27 Mich. 390. See *Jones v. Hannover*, 55 Mo. 462; *Noonan v. Albany*, 79 N. Y. 470.

² *Waffle v. New York Railroad Co.*, 58 Barb. 413; 53 N. Y. 11; *Waffle v. Barber*, 61 Barb. 130.

³ *Ibid.*

⁴ *Ashley v. Wolcott*, 11 Cush. 192; *Bigelow, C. J.*, in *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106; *Murphy v. Kelley*, 68

Maine, 521; *Eulrich v. Richter*, 37 Wis. 226; *Schlichter v. Phillipy*, 67 Ind. 201. *A fortiori*, to shut out foul water. *Beard v. Murphy*, 37 Vt. 99. Even if drift-wood carried along by floods be deposited on another's land. *Taylor v. Fickas*, 64 Ind. 167.

⁵ *Grant v. Allen*, 41 Conn. 156.

⁶ *Palmer v. Waddell*, 22 Kans. 352. See *Bowlsby v. Speer*, 2 Vroom, 35; *Hoyt v. Hudson*, 27 Wis. 656.

⁷ 26 Penn. St. 415 n.

⁸ *Overton v. Sawyer*, 1 Jones (Law) 308; *Porter v. Durham*, 74 N. C. 767; *Tootle v. Clifton*, 22 Ohio St. 247; *Hicks v. Silliman*, 93 Ill. 255; *Lau-*

in such a manner as to injure the owner of the servient estate, and his act is not in the interest of good husbandry, it is an injury for which the latter has a remedy by action or by the preventive remedy of injunction.¹ And it is an actionable injury, without proof of actual damage, to prevent the flowing off of surface water by the erection of an embankment on one's own land.²

§ 277. An owner of premises adjacent to a street or highway may place any obstruction thereon to shut out the flow of mere surface water from such street or highway, and will not be liable to an action by the city or town for damage thereby suffered.³

§ 278. A land-owner who places noxious substances on his land, polluting the surface water or superficially percolating waters passing thence upon the premises of an adjoining owner to his injury, will be liable in an action for such pollution.⁴ But a land-owner across whose lot foul water flows from a higher source upon a lower estate, without any fault on his part, is not liable therefor.⁵

§ 279. An owner of land, the natural drainage of which flows over the land of an adjoining owner, cannot by any lapse of time gain a right by prescription to have such flow continue, if at any time the owner of the lower estate chooses to interrupt or divert such flow.⁶ And the continued flowing

mier v. Francis, 23 Mo. 181; *Ogburn v. Connor*, 46 Cal. 346. See *ante*, § 266.

¹ *Harrington v. Peck*, 11 Brad. (Ill.) 62; *Livingston v. McDonald*, 21 Iowa, 160.

² *Tootle v. Clifton*, 22 Ohio St. 247; *Butler v. Peck*, 16 Ohio St. 334.

³ *Franklin v. Fisk*, 13 Allen, 211; *Bangor v. Lansil*, 51 Maine, 521; *Limerick Co.'s Appeal*, 80 Penn. St. 425; *Merrick, J., in Flagg v. Worcester*, 601, 607.

⁴ *Brown v. Illius*, 27 Conn. 84;

Gawtry v. Leland, 31 N. J. Eq. 385. See *Beard v. Murphy*, 37 Vt. 99; *Winn v. Rutland*, 52 Vt. 48; *Jacksonville v. Lambert*, 62 Ill. 519; *Jutte v. Hughes*, 67 N. Y. 267.

⁵ *Brown v. McAllister*, 39 Cal. 573. See *Sellick v. Hall*, 47 Conn. 260; *Barring v. Commonwealth*, 2 Duv. (Ky.) 95.

⁶ *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Foster, J., in White v. Chapin*, 12 Allen, 516; *Swett v. Cutts*, 50 N. H. 439.

of mere surface water or of the natural drainage upon or across land, either in natural or artificial channels, for any length of time, will not, in general, confer any right by prescription upon the owner of the land or any one using the water for any purpose to compel the continuance of such flow in the same manner and direction.¹ But the owner of land, by collecting into artificial channels the surface water or superficial drainage there flowing, and discharging such accumulations upon or across the land of an adjoining owner adversely for a sufficient length of time, may acquire an easement in such adjacent land for the continuance of such discharge.²

§ 280. Water percolating through the ground beneath the surface, either without a definite channel, or in courses which are unknown and unascertainable, belongs to the realty in which it is found.³ The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor, or consequentially injure his clearly defined rights, is applicable to the interruption of sub-surface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress.⁴ The land-owner may, therefore, make a ditch to drain

¹ Wood v. Waud, 3 Exch. 748; Greatrex v. Hayward, 3 Exch. 291; Broadbent v. Ramsbotham, 11 Exch. 602; Rawstron v. Taylor, 11 Exch. 369; Foster, J., in White v. Chapin, 12 Allen, 516.

² Claxton v. Claxton, Ir. R. 7 C. L. 23; White v. Chapin, 12 Allen, 516; Earl v. De Hart, 1 Beas. 280; Conklin v. Boyd, 46 Mich. 56; ante, § 225.

³ Chasemore v. Richards, 7 H. L. Cas. 349; 5 H. & N. 988; Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Acton v. Blundell, 12 M. & W. 324; Hammond v. Hall, 10 Sim. 552; Cooper v. Barber, 3 Taunt. 99; Balston v. Bensted, 1 Camp. 463; Chase v. Silverstone, 62 Maine, 175; Roath v. Driscoll, 20 Conn. 533; Brown v. Illius, 27 Conn. 84; 25 Conn. 593; Taylor v. Fickas, 64 Ind. 167; Delhi v. Youmans, 45 N. Y. 362; s. c. 50

Barb. 316; Dexter v. Providence Aqueduct Co., 1 Story, 387; Wheatley v. Baugh, 25 Penn. St. 528; Halde- man v. Bruckhart, 45 Penn. St. 514; Coleman v. Chadwick, 80 Penn. St. 81; Trout v. McDonald, 83 Penn. St. 126; Smith v. Adams, 6 Paige, 435; 24 Wend. 585; Ellis v. Duncan, 29 N. Y. 466; 21 Barb. 230; Radcliff v. Brooklyn, 4 N. Y. 195, 200; Pixley v. Clark, 35 N. Y. 520; 32 Barb. 268; Goodale v. Tuttle, 29 N. Y. 466; Bliss v. Greeley, 45 N. Y. 671; Frazier v. Brown, 12 Ohio St. 294; Chatfield v. Wilson, 28 Vt. 49; 31 Vt. 358; Clark v. Conroe, 38 Vt. 469; Taylor v. Welch, 6 Oregon, 198; Mosier v. Caldwell, 7 Nev. 363; New Albany Railroad Co. v. Peterson, 14 Ind. 112; Bassett v. Salisbury Manuf. Co., 43 N. H. 573.

⁴ Ibid.

his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land.¹ The only remedy for the latter is to sink his own well deeper.² He may take the water which would otherwise pass by natural percolation into the adjoining land, or draw off the water which may come by natural percolation from that land,³ and no adverse right to prevent the exercise of this privilege can be acquired by prescription.⁴

§ 281. If underground currents of water flow in clearly defined channels, the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them;⁵ but if it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they are presumed to be formed by the ordinary percolations of water in the soil.⁶ Some such presumption is necessary on account of the difficulty of determining whether the water flows in a channel, but in all other respects there appears to be no distinction between subterranean waters and those upon the surface.⁷ An action will equally lie for the obstruction or misuse of subterranean or of surface water after it has become a part of an open stream or spring,⁸ and the owner of land has no right to construct his well or other structure in such manner as to create upon his own land an artificial underground current

¹ Ibid.

² *New River Co. v. Johnson*, 2 El. & El. 445; *Brain v. Marfell*, 41 L. T. N. S. 455.

³ Ibid.; *Wilson v. New Bedford*, 108 Mass. 261, 265.

⁴ *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 982; *Smith v. Kendrick*, 7 C. B. 546; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Swett v. Cutts*, 50 N. H. 439; *Wheatley v. Baugh*, 25 Penn. St. 528; *Frazier v. Brown*, 12 Ohio St. 294; *Carbrey v. Willis*, 7 Allen, 367; *Roath v. Driscoll*, 20 Conn. 533.

⁵ Ibid.; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Chasemore v. Richards*, 2 H. & N. 186; 7 H. L. Cas. 374; *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 470; *Hale v. McLea*, 53 Cal. 578; *Strait v. Brown*, 16 Nev. 317; *Smith v. Adams*, 6 Paige, 433; *Mahan v. Brown*, 13 Wend. 261.

⁶ *Hanson v. McCue*, 42 Cal. 303.

⁷ *Swett v. Cutts*, 50 N. H. 439.

⁸ *Delhi v. Youmans*, 45 N. Y. 362; 50 Barb. 316; *Saddler v. Lee*, 66 Ga. 45.

of water from a running stream.¹ A person who appropriates underground water by intercepting and storing it, will be restrained from discharging it upon or into his neighbor's land or mine, although, if not intercepted, it might have found its way there by percolation.² In New Hampshire a different rule from that above stated has been adopted, it being held, with respect to both surface water not gathered into a stream, and to water percolating through the soil, that the land-owner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land;³ and, in general, the exemption from liability for withdrawing water from a neighbor's well or spring by percolation does not exist when the acts complained of violate a grant or covenant.⁴ With respect to the statute of limitations there is no distinction between trespasses above and below the surface of the earth, and it is not material whether the plaintiff has knowledge of the cause of action within the time limited by the statute.⁵ But no right can be acquired by prescription in mere percolating waters.⁶

§ 282. In *Acton v. Blundell*,⁷ decided in 1843, in the Exchequer Chamber, the plaintiff's mill was carried by water raised from a well on his land. This supply of water was destroyed by a coal-pit dug by the defendant on his own land at a distance of half a mile from the well. The loss was held to be *damnum absque injuria*. Tindal, C. J., said: "In the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but

¹ *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Ætna Mills v. Brookline*, 127 Mass. 69, 71; *Emporia v. Soden*, 25 Kansas, 588.

² *West Cumberland Iron Co. v. Kenyon*, 6 Ch. D. 773.

³ *Bassett v. Salisbury Manuf Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439.

⁴ *Johnstown Cheese Manuf. Co. v. Veghte*, 69 N. Y. 16; *Whitehead v.*

Parks, 2 H. & N. 870; *Cooke v. Chilcott*, 3 Ch. D. 694.

⁵ *Hunter v. Gibbons*, 1 H. & N. 459; *Hawk v. Minnich*, 19 Ohio St. 466; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583.

⁶ *Bealey v. Shaw*, 6 East, 208; *Balston v. Bensted*, 1 Camp. 463. See *Whetstone v. Bowser*, 29 Penn. St. 59.

⁷ 12 M. & W. 324, 350, 351.

through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well; again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all." "If the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil." "The advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle, whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined."

§ 283. In *Dickinson v. Grand Junction Canal Co.*,¹ the Court of Exchequer held, in 1852, that the defendants who sank a well upon their own premises, and thereby prevented water from percolating in its natural course into a river on which the plaintiff's mill was situated, to his damage, were liable therefor at common law. But in 1856, the same court held, in *Broadbent v. Ramsbotham*,² that where the plaintiff's mill had, for more than fifty years, been worked by a brook supplied with water from a pond filled by rain, a shallow well supplied by subterranean waters, a swamp and a well

¹ 7 Exch. 282.

² 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369.

formed by a stream issuing from the side of a hill, all which waters occasionally overflowed and ran down the defendant's land in no defined channel into the brook, the plaintiff had no right, as against the defendant,¹ to the flow of any of these waters.

§ 284. In the leading case of *Chasemore v. Richards*,¹ the plaintiff's mill had been propelled for more than sixty years by the River Wandle which had its rise in the town of Croyden, and was largely fed by the rain falling upon a large territory which included the town, and percolating through the ground to the river. The defendants sunk a deep well in their land a quarter of a mile from the source of the river for the purpose of supplying the town with water, and thereby abstracted so much of the underground water, which would otherwise have found its way into the river, as to appreciably retard the mill. The action was brought for this cause, and judgment was given for the defendants by the Court of Exchequer in 1856. In the Exchequer Chamber this was affirmed, all the judges concurring in the opinion delivered by Cresswell, J., except Coleridge, J., whose dissenting opinion was based upon the maxim *sic utere tuo ut alienum non laedas*. In the House of Lords the former judgment was unanimously re-affirmed, although Lord Wensleydale hesitated as to sustaining the view of the other judges in its full extent. The decision in *Broadbent v. Ramsbotham* was followed, and that in *Dickinson v. Grand Junction Canal Co.* was disapproved. In *New River Co. v. Johnson*,² the plaintiff was held, upon the authority of the foregoing decisions, to have no cause of action against the defendant for acts which prevented water from percolating into her well, or for abstracting from the well water which had already found its way there. In *Regina v. Metropolitan Board of Works*,³ the prosecutor's estate was situate in part upon a gravel bed, which was imbedded in a basin of clay,

¹ 7 H. L. Cas. 349; 5 H. & N. 982;
2 H. & N. 168; *Hodgkinson v. Ennor*,
4 B. & S. 229 (1863).

² 2 El. & El. 435 (1860).
³ 3 B. & S. 710 (1863); *Chase v.*
Silverstone, 62 Maine, 175.

and in which there had existed from time immemorial, on the lower part of the premises, a pond fed by powerful springs at its bottom. The water overflowed one edge of the clay-basin, and formed a rivulet which ran through the grounds and supplied ornamental ponds there, and which was used for the cattle and for supplying the garden. The defendants constructed a sewer under a highway near by, and cut through the gravel bed and basin of clay, the immediate effect of which was to prevent the springs from finding their way into the pond, which, with the rivulet and other ponds, became dry in consequence. The case was held not distinguishable from that of *Chasemore v. Richards*.

§ 285. In *Wheatley v. Baugh*,¹ Lewis, C. J., said: "In limestone regions streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, for all the purposes of life. To say that these streams might be obstructed or diverted, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water. But to entitle a stream to the consideration of the law, it is certainly necessary that it be a watercourse in the proper sense of the term. A spring gutter on the surface is none the less a watercourse, although it is not equal in volume to a river. Small as it may be, if it have a clear and well-defined channel, and a regular flow in that channel, it cannot be diverted to the injury of the proprietors below."² "So a subterranean stream which supplies a spring with water cannot be diverted by the proprietor above for the mere purpose of appropriating the water to his own use."³ As the owner of the land below is bound to permit the stream to flow in its accustomed channel, and cannot erect obstructions so as to

¹ 25 Penn. St. 528, 531, 533.

Wend. 330; *Whetstone v. Bowser*,

² *Broadbent v. Ramsbotham*, 11 29 Penn. St. 59.

Exch. 602; *Dudden v. Guardians*, 1
H. & N. 627; *Arnold v. Foot*, 12

³ *Smith v. Adams*, 6 Paige, 435.

throw the water back on his neighbor above, so the latter is bound, as a correlative obligation, to permit it to flow to his neighbor below." "The owner of land, on which a spring issues from the earth, has a perfect right to it against all the world, except those through whose land it comes. He has even a right to it, as against them, until it comes in conflict with the enjoyment of their own property. Strangers cannot destroy it, even though it be derived from lands which do not belong to the owner of the spring. Even a railroad corporation, armed by law with the eminent domain, and having power to take private property for the construction of its road, is answerable to the owner of a spring for destroying it, although its destruction be caused by excavations on the land of an adjacent proprietor.¹ But while the court in that case held that the corporation was liable, on the ground that the destruction of the spring was not required for the purposes of the owner of the land through which the excavation was made, the principle was fully recognized that each proprietor has a right to make a proper use of his own land, and that sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss arises, it is *damnum absque injuria*."

§ 286. In *Ballacorkish Co. v. Harrison*,² the Privy Council held that a grantor of the surface of land, who reserves the mines beneath, is not responsible for draining the water from the surface by working the mines in the absence of an express agreement. In *Brain v. Marfell*,³ the sale of a well and of the right to convey water through the defendant's land was held by the Court of Appeal to give merely the right to the water after it had risen in the well, and that the interception of percolating water before it reached the well afforded no cause of action. When rights of water are created by deed, the nature and extent of the parties' interest

¹ Citing *Parker v. Boston & Maine Railroad Co.*, 3 Cush. 107. See *New Albany Railroad v. Peterson*, 14 Ind. 112.

² L. R. 5 P. C. 49.

³ 41 L. T. N. S. 455. See *Huston v. Leach*, 53 Cal. 262.

are determined by the deed, and not by the rights which the parties would possess as riparian proprietors or otherwise. If a grant is made of all streams of water that may be found in certain land, in which there is a single stream and several wells, the grantor, or those who claim through him, cannot drain off the subterranean water from the land.¹ A grant of the privilege of taking water from springs in a certain locality gives the right to take it only where it usually issues from the ground by natural forces, and not from wells or orifices in the ground where the water does not flow to the surface.² A grant of a well passes a fee in the land occupied by the well,³ and the well includes, *ex vi termini*, not only the orifice which reaches down to the water, but the whole opening in the earth before it is stoned and the stone laid into the wall and the water therein.⁴ Where a spring was set out and separated from other lands by the owner so as to extend three rods each way from the central portion covered by the water, the word "spring" in a deed was held to pass the land so set out and separated to be used with the spring.⁵

§ 287. In *Harwood v. Benton*,⁶ in Vermont, it was held that the owner of a mill-pond, who raises the height of water upon his own land, and thereby causes subterranean streams to set back and flow another's land, is not liable for the injury. This is, however, in conflict with the decision of the Supreme Court of New Hampshire in *Bassett v. Salisbury Manuf. Co.*⁷ In *Cole Silver Mining Co. v. Virginia Water Co.*,⁸ in the Circuit Court of the United States, it was held that, in the West, where rights in water are acquired by prior appropriation,⁹ one who in working a mining claim excavates a tunnel opening a subterranean flow of water

¹ *Whitehead v. Parks*, 2 H. & N. 870; *Northam v. Hurley*, 1 El. & Bl. 665.

² *Magoon v. Harris*, 46 Vt. 264, 271.

³ *Johnson v. Rayner*, 6 Gray, 107.

⁴ *Mixer v. Reed*, 25 Vt. 254; *Clark v. Conroe*, 38 Vt. 469, 474.

⁵ *Woodcock v. Estey*, 43 Vt. 515.

⁶ 32 Vt. 724.

⁷ 43 N. H. 569.

⁸ 1 Sawyer, 470.

⁹ *Ante*, c. 7.

which is appropriated and enjoyed for several years, is entitled to an injunction against one who constructs a tunnel beneath his own and thereby intercepts and diverts the flow of the water.

§ 288. The foregoing rules do not apply to cases where a person poisons or corrupts the water which percolates from his land to that of his neighbor.¹ "To suffer filthy water," says Foster, J., in *Ball v. Nye*,² "to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precaution which the law requires is, effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence. In the present instance, there was no pretence of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The percolations appear to have been constant and their existence to have been known to the defendant." In the absence of negligence or knowledge, the same rule of liability would, it seems, apply, he whose filth it is being required to keep it on his premises at his peril.³ But in a recent case,⁴ Cooléy, J., pointedly observes: "If withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting

¹ *Wood v. Waud*, 3 Exch. 748; *Hodgkinson v. Ennor*, 4 B. & S. 229; 9 Jur. N. S. 1152; *Baird v. Williamson*, 15 C. B. N. S. 376; *Smith v. Kendrick*, 7 C. B. 515; *Embrey v. Owen*, 6 Exch. 353; *Tenant v. Goldwin*, 6 Mod. 311; 2 Ld. Raym. 1089; 1 Salk. 21; *Frazier v. Brown*, 12 Ohio St. 312; *Pixley v. Clark*, 35 N. Y. 520.

² 99 Mass. 582, 584; *Goodrich v. Burbank*, 97 Mass. 22; *Wilson v. New Bedford*, 108 Mass. 261.

³ *Tenant v. Goldwin*, 2 Ld. Raym. 1089; 6 Mod. 311; *Wormersley v.*

Church, 17 L. T. N. S. 190; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Jacobs v. Worrell*, 15 Leg. Int. 139; *Ottawa Gaslight Co. v. Graham*, 35 Ill. 346; 28 Ill. 73; *Wahle v. Reinbach*, 76 Ill. 322; *Decatur Gaslight Co. v. Howell*, 92 Ill. 19; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Shuter v. City*, 3 Phila. 228.

⁴ *Upjohn v. Richland Township*, 46 Mich. 542, 549. See, also, *Brown v. Illius*, 27 Conn. 84; 25 Conn. 583; *Greencastle v. Hazelett*, 23 Ind. 186.

its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind and degree in the two cases." Fouling an underground stream, which flows into the plaintiff's mill stream or colliery, is an actionable injury.¹ When it is clearly proved that a place of sepulture or such a structure as a gas reservoir will corrupt wells or springs, a court of equity may grant relief by way of injunction.² If the water of a well is rendered impure by an escape of gas therein, the fact that other causes contributed to make it unfit for use is not a bar to an action, but may be shown to affect the amount of damages.³

§ 289. A man has no right to withdraw from his neighbor the support of adjacent soil, but there is nothing at common law to prevent his draining that soil when for any reason it becomes necessary or convenient for him to do so, even though the effect may be to cause a subsidence of the surface.⁴ In *Smith v. Thackerah*,⁵ the defendants dug a well near the plaintiff's land, which sank in consequence, and a building erected thereon within twenty years fell. It appearing that if the building had not been on the land, the land would still have sunk, but the damage to the plaintiff would have been inappreciable, it was held that there was no cause of action.

§ 290. In *Greenleaf v. Francis*,⁶ it was held that, in the absence of any agreement subjecting his estate to another, or of rights acquired by adverse enjoyment, the owner may consult his own convenience in his operations above or below the surface of his land; that each owner of adjoining

¹ *Hodkinson v. Ennor*, 4 B. & S. 229; *Turner v. Mirfield*, 34 Beav. 390.

² *Ibid.*; *Clark v. Lawrence*, 6 Jones Eq. 83.

³ *Sherman v. Fall River Iron Works Co.*, 5 Allen, 213.

⁴ *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; *Humphries v. Brogden*, 12

Q. B. 739; *Partridge v. Scott*, 3 M. & W. 230; *Elliot v. North Eastern Railway Co.*, 10 H. L. Cas. 333; 1 H. & J. 145; *Wilson v. Waddell*, 2 App. Cas. 95.

⁵ L. R. 1 C. P. 564.

⁶ 18 Pick. 117, 122.

estates has the absolute dominion of the soil, extending upwards and below the surface as far as each pleases, each, however, being bound so to operate below the surface as not to cause the soil to fall in from the adjoining estate. "These rights," it was said, "should not be exercised from mere malice."¹ In a later case before the same court,² Wells, J., referring to *Greenleaf v. Francis*, said: "It is intimated, in this case, that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of

¹ See, also, *Wheatley v. Baugh*, 25 Penn. St. 528; *Haldeman v. Bruckhart*, 45 Penn. St. 514; *Hoy v. Sterrett*, 2 Watts, 327; *Roath v. Driscoll*, 20 Conn. 533; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Panton v. Holland*, 17 Johns. 92; *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 358; *Harwood v. Benton*, 32 Vt. 724, 737; *Radcliff v. Mayor*, 4 Comst. 195; *Bellows v. Sackett*, 15 Barb. 96; *Ellis v. Duncan*, 21 Barb. 230.

² *Walker v. Cronin*, 107 Mass. 555, 564. In the recent case of *Chesley v. King*, in Maine (74 Maine, 164, 175, 177) Barrows, J., said: "The general doctrine of *Walker v. Cronin*, 107 Mass. 555, is not what counsel claim, but rather that, while a man has no right to protection against competition, he 'has a right to be free from malicious and wanton interference, disturbance, and annoyance.' The dictum in *Walker v. Cronin*, adverse to this same doctrine as it was shadowed forth in *Greenleaf v. Francis*, 18 Pick. 117, seems to be based upon what we conceive to be the erroneous assumption that the owner of a spring has no rights whatever in water per-

colating through the soil of adjacent proprietors, because his rights therein are assuredly subject to the paramount claims of the owner of the soil, operating in good faith in his own land, 'for a justifiable cause.' . . . Upon the whole, we are better satisfied with the view of the law on this point which we get from *Acton v. Blundell*, *Roath v. Driscoll*, *Wheatley v. Baugh*, hereinbefore cited, and from *Panton v. Holland*, 17 Johns. 92, 98, and from the instructions approved in *Greenleaf v. Francis*, 18 Pick. 119, than with that given in *Chatfield v. Wilson*. We think this plaintiff had rights in that spring, which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it 'for the mere sole and malicious purpose' of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate."

advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial."¹ A similar decision was made in *Wheatley v. Baugh*;² but the suggestion in *Greenleaf v. Francis* was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of *Parker v. Boston & Maine Railroad*,³ was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right, might be a ground of damages recoverable against one who caused the loss without superior right or justifiable cause." In *Phelps v. Nowlen*,⁴ in New York, the defendant dug a ditch through an embankment which surrounded a spring upon his own land, not for his own benefit, but with the intent to divert the water from the plaintiff's well, whereby the water in the well was lowered and the plaintiff injured. There was held to be no cause of action, irrespective of the intent.

§ 291. Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word land, and is a part of the soil in which it is found.⁵ Like water, it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie.⁶ A lease

¹ Citing *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; *Delhi v. Youmans*, 50 Barb. 316. See, also, *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Harwood v. Benton*, 32 Vt. 737; *Mahon v. Brown*, 13 Wend. 261; *Rawstron v. Taylor*, 11 Exch. 369; *McCune v. Norwich City Gas Co.*, 30 Conn. 521, 524. The acts of public officers in diverting a stream are to be judged according to the lawfulness of the acts and not by their motives. *Moran v. McClearns*, 60 Barb. 388; *Benjamin v. Wheeler*, 8 Gray, 409; *Morrison v. Howe*, 120 Mass. 505.

² 25 Penn. St. 523.

³ Cush. 107.

⁴ 72 N. Y. 39; *Kiff v. Youmans*, 86 N. Y. 324.

⁵ *Kier v. Peterson*, 41 Penn. St. 357, 362; 2 Pitts. 191; *Chicago Oil Co. v. United States Petroleum Co.*, 57 Penn. St. 83; *Stoughton's Appeal*, 88 Penn. St. 198; *Hail v. Reed*, 15 B. Mon. 479. A description of premises in a conveyance which is sufficiently broad to include everything within the meaning of the word "land," includes a spring of water thereon. *Clark v. Conroc*, 38 Vt. 469.

⁶ *Dark v. Johnston*, 55 Penn. St. 164; *Rynd v. Rynd Farm Oil Co.*, 63

of land for the purpose of mining oil, coal, rock, or carbon oil passes a corporeal interest which is the proper subject of an action of ejectment,¹ and the sale of a proportionate part of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the statute of frauds.²

§ 292. The owner of a building who extends the eaves over the adjoining land of another person, so as to cast water thereon from his roof, is liable therefor in an action on the case.³ If the water so falling penetrates his neighbor's wall, he is not relieved of responsibility by the fact that the water would not have entered if the wall had been well built;⁴ and, if a license or agreement is relied upon to justify the dripping, it is void under the statute of frauds, if not in writing.⁵

§ 293. The owner of a house is not liable to his neighbor for eaves-drip, unless there is some neglect of duty on his part;⁶ and the privilege of having rain-water fall from one's eaves upon a neighbor's land may be acquired by twenty years' acquiescence on the part of the latter.⁷ The right to have rain-water drop on land, when once acquired by user, is not lost by increasing the height of the building unless the burden upon the servient tenement is made more onerous.⁸

Penn. St. 397; *Karns v. Tanner*, 66 Penn. St. 297; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Penn. St. 173.

¹ *Baker v. Dale*, 3 Pitts. 190; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Penn. St. 173; *Funk v. Halde- man*, 53 Penn. St. 229.

² *Henry v. Colby*, 3 Brewst. 171. The rule that the possession of the land is not necessary to enable the owner of an incorporeal hereditament to maintain an action on the case for its disturbance, applies in such action by lessees against lessors of a right to bore for oil, and ejectment would not be the proper remedy. *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Penn. St. 173.

³ *Fay v. Prentice*, 1 C. B. 828; *Tucker v. Newman*, 11 Ad. & El. 40;

Garraty v. Duffy, 7 R. I. 476; *Underwood v. Waldron*, 33 Mich. 232; *Simonds v. Pollard*, 53 Vt. 343; *Martin v. Simpson*, 6 Allen, 102; *Bellows v. Sackett*, 15 Barb. 96.

⁴ *Gould v. McKenna*, 86 Penn. St. 297; *Crommelin v. Coxe*, 30 Ala. 318.

⁵ *Tanner v. Volentine*, 75 Ill. 624.

⁶ *Underwood v. Waldron*, 33 Mich. 239; *McHugh v. Curtis*, 48 Mich. 263.

⁷ *Lady Browne's Case*, Palmer, 446, cited in *Sury v. Pigott*, Popham, 166; *Baten's Case*, 9 Rep. 536; *Jones v. Peskett*, 1 M. & S. 234; *Battishill v. Reed*, 18 C. B. 696; *Cherry v. Stein*, 11 Md. 1; *Carbrey v. Willis*, 7 Allen, 364.

⁸ *Thomas v. Thomas*, 2 C. M. & R. 34; *Harvey v. Walters*, L. R. 8 C. P. 162.

The right to have water fall from the eaves of a house into a neighbor's enclosure does not justify casting the water into the same enclosure in a larger body by means of a spout.¹ And a private land-owner who paves his yard, thus rendering it less penetrable by water, and conducts the water in leaders from the roofs of his houses to his yard in quantities beyond the capacity of the drains to carry away, thereby flowing his neighbor's premises, is bound to prevent the water thus accumulating on his own premises from causing injury to his neighbor's, and it is error to submit to the jury the question whether he has done everything practicable in the way of drainage to carry off the water.² It being settled that no one has a right, by an artificial structure of any kind erected upon his own land, to cause the water which collects thereon or therein to be discharged upon his neighbor's land, either in a torrent or stream or in drops, it can make no difference whether the discharge is in the form of snow, or upon land, or the person of a neighbor or of a traveller upon a highway.³

§ 294. In the case of subterranean mines, if one owner removes barriers by a trespass, as by extending his works into his neighbor's mine, he is bound to protect such mine from inundation.⁴ But when a recovery has been had against him for the trespass, he is not liable in damages for the consequential and continued flow of the water, since he cannot enter upon another's land for the purpose of remedying his tortious act.⁵ It is the natural right of each of the owners of two adjoining mines, where neither is subject to any servitude

¹ Reynolds v. Clarke, 2 Ld. Raym. 1399; 8 Mod. 172.

² Jutte v. Hughes, 67 N. Y. 267.

³ Shipley v. Fifty Associates, 106 Mass. 194; 101 Mass. 251; Milford v. Holbrook, 9 Allen, 17, 23; Brooks v. Curtis, 4 Lans. 283; Walsh v. Mead, 8 Hun, 387. See Garland v. Towne, 55 N. H. 55, where the question of negligence in such a case was treated as one of fact for the jury. The occupier is *prima facie* liable. Leonard v. Storer, 115 Mass. 86.

⁴ Firmstone v. Wheeley, 13 L. J. (N. S.) Exch. 361; 2 Dowl. & L. 203; Westminster Brymbo Coal Co. v. Clayton, 36 L. J. Ch. 476; Haward v. Bankes, 2 Burr. 1113; Douty v. Bird, 60 Penn. St. 48. As to erecting barriers against water in mines, see McKnight v. Ratcliff, 44 Penn. St. 156.

⁵ Clegg v. Dearden, 12 Q. B. 561; Taylor v. Stendall, 7 Q. B. 634.

to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, at least if it does not arise from the negligent or malicious conduct of the party.¹ One mine-owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner, and is not bound to give notice of his intention to remove the barriers.²

§ 295. When the flow of the water is increased artificially or is greater than would result from gravitation alone, the mine-owner who causes it is liable for the increased injury to another mine.³ This is termed a "non-natural" use of the land, and the principle applies wherever anything which causes injury to another's close was not in or upon the land in its natural condition, but was introduced in quantities and in a manner not the result of any operation on or under the land; and the injury is caused either by this being done, or by any imperfection in the mode of doing it.⁴ If a miner collects and appropriates the water for his own benefit, he is responsible for its future course, even when it comes to another's land through natural channels.⁵ Where the defendant

¹ *Smith v. Kendrick*, 7 C. B. 505; *Kenyon*, 11 Ch. D. 782; 6 Ch. D. 773; *Musgrove v. Smith*, 37 L. T. 311; 2 Ld. Raym. 1089; *Fletcher v. Rylands*, L. R. 3 H. L. 330, 338; *Bagnall v. London Railway Co.*, 7 H. & N. 423; 1 H. & C. 544; *ante*, § 290. See *Jegon v. Vivian*, L. R. 6 Ch. 742.

² *Trower v. Chadwick*, 6 Bing. N. C. 1; 8 Scott, 1; *Bainbridge on Mines* (4th ed.), 297; *Hurdman v. North Eastern Railway Co.*, 3 C. P. D. 168.

³ *Baird v. Williamson*, 15 C. B. N. S. 376; 12 W. R. 150; *Whitehouse v. Fellowes*, 30 L. J. C. P. 305; *Fletcher v. Rylands*, 3 H. L. 330, 339. See *Elwell v. Crowther*, 31 Beav. 163.

⁴ *Ibid.*

⁵ *West Cumberland Iron Co. v. Mr. Justice Fry* (in 6 Ch. D. 773) de-

by his coal works disturbed the soil above, which was naturally impervious to water, and caused fissures by the subsidence of the soil through which the natural rainfall on the surface passed into the defendant's workings, and thence by gravitation into the plaintiff's, it was held that there was no servitude on the owner of the upper mines, for the benefit of the owner of the mines on the dip, to preserve either the surface or the subjacent minerals as watertight as the undisturbed state of the strata;¹ or to prevent the withdrawal by percolation of water from the wells and springs of the superjacent land.² The owner of two adjoining mines, who in working the lower stops up an opening from the higher, wherein the accumulated water rises until it flows over into the plaintiff's mine, is not liable for the consequent injury, especially if the opening from the higher mine into the plaintiff's was caused by a trespass of the plaintiff's predecessor.³ An injunction will issue where the damage will be inevitable, or the workings are clearly improper,⁴ if applied for within a

cided that the defendants, by making the shaft, appropriated the water and made themselves masters of it, and became bound to prevent its flowing into the plaintiff's works. On appeal (11 Ch. D. 782) it was held, reversing his decision, that the defendants' act was not an appropriation, the effect of making the shaft and borehole being merely to alter the course of the water, and not to add to the amount of water thrown upon the plaintiff, or vary the time of its getting there.

¹ *Wilson v. Waddell*, 2 App. Cas. 95. In Pennsylvania, a mine-owner is bound to leave sufficient support for the surface; and if he withdraws such support, whereby the surface sinks and cracks, allowing surface water to flow into his mine, and thence into the mine of an adjoining owner, he is liable for the resulting damage. *Homer v. Watson*, 79 Penn. St. 242.

² *Ballacorkish Mining Co. v. Harrison*, L. R. 5 P. C. 49; 29 L. T. n. s.

658; *Wheatley v. Baugh*, 25 Penn. St. 525; *Coleman v. Chadwick*, 80 Penn. St. 81; *Trout v. McDonald*, 83 Penn. St. 144. A lessor, who, in quarrying, caused water to percolate into, and to flood his lessee's mine, was held liable on his covenant for quiet enjoyment in *Shaw v. Stenton*, 2 H. & N. 858.

³ *Lomax v. Stott*, 39 L. J. Ch. 834. In *Locust Mountain Coal and Iron Co. v. Gowell*, *Agnew, J.*, held at *nisi prius*, that a mine-owner, who, in extending a gangway, struck an opening that had been wrongfully made by a trespasser up the dip of his coal-vein, is not justified in turning the water flowing down the gutter of the gangway into such opening, whence it will run into a lower mine, if he can easily carry the water across the opening, as by means of a wooden trunk into a drain leading into his own pit.

⁴ *Crompton v. Lee*, L. R. 19 Eq. 115; *Robinson v. Byron*, 18 Ves. 517; *Beaufort v. Morris*, 6 Hare, 340; *Mexborough v. Bower*, 7 Beav. 127; *Stralley v. Pearson*, 28 W. R. 752.

reasonable time after the commencement of the workings,¹ or after the right to damages has been established by action at law.²

§ 296. In *Fletcher v. Rylands*,³ the owners of a mill constructed a reservoir for the purpose of accumulating water from their own and adjoining lands, and employed an engineer and a contractor to choose the site and direct the work. The contractor failed to provide sufficient support to resist the pressure of the water in certain old shafts which communicated with ancient coal workings, the existence of which was then unknown to the defendants or to any of the persons employed by them. The reservoir burst, and the water therein penetrated through intervening coal workings into the plaintiff's colliery, which was flooded. In the Court of Exchequer it was held that the defendants were not liable for the injury in the absence of negligence on their part, or of knowledge that unusual caution was necessary. But in the Exchequer Chamber, and afterwards in the House of Lords, the views of Bramwell, B., in a dissenting opinion, were sustained, and the defendants were held liable upon the ground that "foreign" water had been sent down upon the plaintiffs, and that the defendants' lack of knowledge thus became immaterial. The principle established is thus stated and illustrated by Mr. Justice Blackburn in the Court of Exchequer Chamber: "We think that the true rule of law is, that the person who, for his own purposes, brings on his

¹ *Ibid.*; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515.

² *Ibid.*

³ L. R. 3 H. L. 330; L. R. 1 Ex. (Ex. Ch.) 265; 4 H. & C. 263; 3 H. & C. 774; *Smith v. Fletcher*, 2 App. Cas. 781; L. R. 7 Ex. 305; *Wilson v. Newberry*, L. R. 7 Q. B. 31; *Musgrave v. Smith*, 47 L. J. 4; 37 L. T. 367; *Dunn v. Birmingham Canal Navigation*, L. R. 7 Q. B. 244; L. R. 8 Q. B. 42; *Humphreys v. Cousins*, 2 C. P. D. 230; *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5; 27 Am. L. Reg. 348; *Chalmers v. Dixon*, 3 Sessions

Cases (4th series) 461; *Nugent v. Smith*, 1 C. P. D. 423; *Box v. Judd*, 1 C. P. 423; *Cahill v. Eastman*, 18 Minn. 324; *Knapheide v. Eastman*, 20 Minn. 478; *Gilham v. Madison County Railroad Co.*, 49 Ill. 484; *The Nitro-Glycerine Case*, 15 Wall. 524; *Parrot v. Barney*, 1 Sawyer, 423; 1 Deady, 405; *Gorham v. Goss*, 125 Mass. 232. See *Wilson v. Newberry*, L. R. 7 Q. B. 31; *Hurdman v. North-Eastern Railway Co.*, 3 C. P. D. 168; *Cattle v. Stockton Water Works*, L. R. 10 Q. B. 453.

lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued; and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And, upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." The principle thus established has since been applied to injuries resulting to adjoining land from the percolation of the waters of an artificial reservoir through the soil;¹ to dampness caused in the plaintiff's house by an artificial deposit near by of spongy soil and clay;² to damage caused by the neglect of

¹ *Wilson v. New Bedford*, 108 Mass. 261; *Gray v. Harris*, 107 Mass. 492; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 46; *Pixley v. Clark*, 35 N. Y. 520. See *Roths v. Kircaldy*, L. R. 7 H. L. P. C. 604, the case of a water-

works company, imposing similar liability.

² *Hurdman v. North Eastern-Railway Co.*, 26 W. R. 489; 3 C. P. D. 168. See *Broder v. Saillard*, 2 Ch. D. 700.

the occupier of a house to adjoining premises from the escape of sewage from defective drains under the first house.¹ In New York,² New Hampshire,³ and New Jersey,⁴ the doctrine of *Fletcher v. Rylands* is qualified, and it is held to be a question of fact for the jury whether the defendant was guilty of negligence. If an artificial accumulation of water is for the benefit of both plaintiff and defendant, as where they are respectively tenants of the upper and lower stories in the same house, the principle of *Fletcher v. Rylands* does not apply, and the defendant is liable only for ordinary negligence.⁵ Nor does such extraordinary liability arise when the water is accumulated for public purposes under the express authority of a statute, and negligence is not proved.⁶

§ 297. Where it appeared that large quantities of water accumulated in artificial pools on the defendant's land, which were formed by damming up, with artificial embankments, a natural stream flowing through the defendant's land, an extraordinary and excessive rainfall, which amounted to *vis*

¹ *Humphreys v. Cousins*, 2 C. P. D. 239; *Hodgkinson v. Ennor*, 4 B. & S. 241.

² *Losee v. Buchanan*, 51 N. Y. 476. See *Seldon v. Delaware Canal Co.*, 23 Barb. 362; *Bellinger v. New York Central Railroad Co.*, 23 N. Y. 47; *Hay v. Cohoes Co.*, 2 Comst. 159.

³ *Garland v. Towne*, 55 N. H. 55. See *Brown v. Collins*, 53 N. H. 443; *Swett v. Cutts*, 50 N. H. 439.

⁴ *Marshall v. Welwood*, 38 N. J. L. 339. See, also, *Hoyt v. Hudson*, 27 Wis. 656; *Pettigrew v. Evansville*, 25 Wis. 223; *Proctor v. Jennings*, 6 Nev. 83; *Simonton v. Loring*, 68 Maine, 164.

⁵ *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661; *Bell v. Twentymen*, 1 Q. B. 766. See *Marshall v. Cohen*, 44 Ga. 489; *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453.

⁶ *Dunn v. Birmingham Canal Co.*,

L. R. 7 Q. B. 244; L. R. 8 Q. B. (Ex. Ch.) 42; *Dudley Canal Navigation Co. v. Grazebrook*, 1 B. & Ad. 59; *Blyth v. Birmingham Water Works*, 25 L. J. Ex. 212; *Eaton v. B. C. & M. R. Co.*, 5 N. H. 504. A horse-railroad company may lawfully throw snow from the track upon a street, but may be held liable by a jury, if it casts the snow into the gutter and thereby so obstructs the flow of water as to flood the plaintiff's premises. *Short v. Baltimore City Passenger Railway Co.*, 50 Md. 73. The doctrine of *Fletcher v. Rylands* has been held by the privy council not to apply in India where water was stored from time immemorial in tanks for the purposes of irrigation and the public benefit, and these were protected by the local law. *Madras Railway Co. v. The Zemindar*, 30 L. T. N. S. 22 W. R. 865.

major, and caused the embankments to be carried away and the accumulated waters to rush down the stream and injure the plaintiff's property, was held to be the sole proximate cause of the escape of the water and not to give the plaintiff a cause of action.¹ So, where the defendants' reservoir, constructed with sluices, connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into the drain at a lower level, and the combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and cause an overflow thence upon the plaintiff's land, the defendants were held not liable, it appearing that they had no control over the main drain, or the other reservoir, or knowledge of the cause of the injury, and that the sluices prevented overflow under ordinary circumstances.²

§ 298. A person may lawfully collect water by means of a dam, or in ditches, canals, or pipes, and is not liable in such a case for injuries caused by the escape of the water, in the absence of negligence on his own part,³ or when the work is

¹ *Nichols v. Marsland*, 2 Exch. Div. 1; L. R. 10 Exch. 255; *Fletcher v. Smith*, 2 App. Cas. 781; L. R. 9 Ex. 64; L. R. 7 Ex. 305; *River Wear Commissioners*, 26 W. R. 217. *Melish*, L. J., here said: "If, indeed, the making of the reservoir was a wrongful act in itself, it might be right to hold the defendant liable for the consequences of his own wrongful act, even although occasioned by the act of God, just as he would be liable in the case of an absolute contract. But the making of a reservoir is not itself a wrongful act, unless as in *Fletcher v. Rylands*, it is on land the peculiar character of which allows the water to escape and do damage." See *Mahoney v. Libbey*, 123 Mass. 20; *Gorham v. Goss*, 125 Mass. 232.

² *Box v. Judd*, 4 Exch. D. 76.

³ *Livingston v. Adams*, 8 Cowen, 175; *Shrewsbury v. Smith*, 12 Cush. 177; *Blyth v. Birmingham Water Co.*, 11 Exch. 781; *Noyes v. Shepherd*, 30 Maine, 173; *China v. Southwick*, 12 Maine, 238; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 9 Rawle, 9; *Bell v. McClintock*, 9 Watts, 120; *Pollet v. Long*, 56 N. Y. 200; *New York v. Bailey*, 3 Denio, 433; *Lapham v. Curtis*, 5 Vt. 371; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413; *Campbell v. Bear River Mining Co.*, 35 Cal. 683; *Tenney v. Miners' Ditch Co.*, 7 Cal. 335; *Wolf v. St. Louis Water Co.*, 10 Cal. 541; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225; *Frye v. Moore*, 53 Maine, 583; *Fraler v. Sears Water Co.*, 12 Cal. 555;

done by competent and independent contractors.¹ There is, therefore, no liability where a dam, which is properly constructed and kept in repair, breaks and causes injury to lands below because of an extraordinary flood or other act of God,² or when, in consequence of great and exceptional floods, it injures a land-owner above.³ The owner of the dam is held responsible only for that degree of care, skill, and diligence in its construction and maintenance which men of ordinary prudence are accustomed, in similar cases, to employ.⁴ But if the injury is caused by hazardous experiments, by the imperfect construction of a dam or canal embankment or negligence in maintaining it, the owner is liable.⁵ And if a stream is subject to extraordinary freshets once in several years, although at no regular intervals, a person who builds a dam across the stream is bound to so construct it as to resist such freshets.⁶

Wright *v.* Holbrook, 52 N. H. 120;
Washburn *v.* Gilman, 64 Maine, 163,
168; McArthur *v.* Green Bay Canal
Co., 34 Wis. 139.

¹ Boswell *v.* Laird, 8 Cal. 469.

² Ibid.

³ Ibid.; Young *v.* Leedom, 67 Penn.
St. 351; McCoy *v.* Danley, 20 Penn.
St. 89; Monongahela Navigation Co.
v. Coon, 6 Barr, 379; Smith *v.* Aga-
wam Canal Co., 2 Allen, 358.

⁴ Ibid.; Todd *v.* Cochell, 17 Cal.
97.

⁵ Cahill *v.* Eastman, 18 Minn. 324;
Knapheide *v.* Eastman, 20 Minn. 478;
St. Anthony Falls Water Power Co.
Eastman, 20 Minn. 277; Porter *v.* Pe-
quonnoc Manuf. Co., 17 Conn. 249;
Tuolumne Water Co. *v.* Columbia
Water Co., 10 Cal. 193.

⁶ Gray *v.* Harris, 107 Mass. 492;
New York *v.* Bailey, 2 Denio, 133.

CHAPTER X.

CONTRACTS AND COVENANTS.

SECTION.

- 299. Easements in general.
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- 302. Covenants personal and real.
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- 305. Appurtenances.
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- 315. Partition.
- 316. Easements follow parted estates. — Mining ditches indivisible.
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- 325. Misrepresentations as to water easements actionable.
- 326. Promissory representations non-actionable.
- 327. Damages.
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§ 299. In addition to the rights which riparian proprietors possess *ex jure naturae*, other rights may be acquired in watercourses known as easements. An easement is a privilege without profit which the owner of one tenement has in an adjoining tenement, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant estate.¹ Easements in watercourses are exclusively affirmative, that is, the exercise of the easement obliges the servient owner to suffer something on his own land, which would be a cause of action if the right did not exist. Such rights may be acquired by a contract, express or implied, or by prescription, which presupposes a contract or grant from the long-continued exercise of the right. The grantor of land through which a stream of water flows may reserve the water privilege, or he may convey the use of the water in whole or in part, leaving the fee of the land vested in the grantor.² If a miller purchases the water privilege adjoining his mill, the right of soil remaining in the original proprietor, he gains an incorporeal hereditament; but if he buys the land itself over which the water flows, he has a corporeal tenement, and the right which he possesses in respect to the watercourse is real.³ In the former case the right acquired is an easement and not a *profit a prendre*, since running water, whether above or below the surface of the earth, is not a product of soil and does not remain in any one place.⁴ The right to enter upon another's close and there take water for domestic purposes from a natural fountain, as a pond or a running spring, is an easement only, sustainable by proof of custom by the inhabitants.⁵ So the privilege of laying pipes in

¹ *Termes de la Ley*, tit. Easement; *Monsey v. Ismay*, 3 H. & C. 497.

² *Rood v. Johnson*, 26 Vt. 64; *Milner v. Lapham*, 44 Vt. 416; *Soule v. Russell*, 13 Met. 436.

³ *Ibid.*; *Woolrych on Waters*, 146; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Morgan v. Mason*, 20 Ohio, 401; *Wall v. Cloud*, 3 Humph.

181, 184; *Smith v. Ford*, 48 Wis. 166.

⁴ *Race v. Ward*, 4 El. & Bl. 702; *Mounsey v. Ismay*, 3 H. & C. 486; *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; *Manning v. Wasdale*, 5 A. & E. 758; *Owen v. Field*, 102 Mass. 90; *Hill v. Lord*, 48 Maine, 83, 99; 3 Kent Com. 427.

⁵ *Ibid.*

another's land for the purpose of taking water, and of entering upon the land to lay, repair, or renew such pipes, is an interest in the realty which is assignable, descendible, and devisable.¹ The right to water in wells or cisterns is an interest in land, although not a *profit a prendre*, and may be claimed by custom.²

§ 300. An easement in a watercourse can only be created by deed;³ and when so created, the grantor cannot derogate from the deed, and the nature and extent of the rights of the parties can only be determined thereby.⁴ A grantee of a water privilege whose deed contains no covenant as to the height of the dam or his rightful extent of flowage, is without remedy at law or in equity, if he is subjected to damages by reason of his maintenance of a dam at an improper height.⁵ The above rule applies equally whether the water flows in a natural or artificial channel, or is mere surface or percolating water;⁶ and whether all the interest in the soil beneath the water is conveyed, or only so much as is necessary for a due enjoyment of the water, yet the interest is of such a character that

¹ Goodrich v. Burbank, 12 Allen, 459; 97 Mass. 22; Amidon v. Harris, 113 Mass. 68; Hankey v. Clark, 110 Mass. 262; French v. Morris, 101 Mass. 68; Lonsdale Co. v. Moies, 21 Law Rep. 664. See McMullin v. Wooley, 2 Lan. 394.

² Ibid.; Hill v. Lord, 48 Maine, 100; Goodrich v. Burbank, 12 Allen, 459, 461.

³ Co. Litt. 9a.; Hewlins v. Ship-pam, 5 B. & C. 221, 229; Cocker v. Cowper, 1 C. M. & R. 418; Cook v. Stearns, 11 Mass. 533; Fuller v. Plymouth, 15 Pick. 81; Short v. Woodward, 13 Gray, 86; Stevens v. Stevens, 11 Met. 251; Banghart v. Flummerfelt, 43 N. J. L. 28; Carlton v. Redington, 21 N. H. 291; Stevens v. Dennett, 51 N. H. 324; Fuhr v. Dean, 29 Mo. 116; Miller v. Auburn & Syracuse Railroad Co., 6 Hill, 61; Brown v. Woodworth, 5 Barb. 550; Russell v.

Scott, 9 Cowen, 279; Wiseman v. Lucksinger, 84 N. Y. 31; — v. Deberry 1 Hayw. (N. C.) 248; Watrous v. Watrous, 3 Conn. 373; Moore v. Sinks, 2 Ind. 257; Foot v. New Haven Co., 23 Conn. 214. Under the statutes of Ohio, an unsealed written license to enter upon and imbed water pipes in another's land, with privilege to enter and repair them, creates no incumbrance upon the land as against a subsequent purchaser. Wilkins v. Irvine, 33 Ohio St. 138.

⁴ Northam v. Hurley, 1 E. & B. 665; Whitehead v. Parks, 2 H. & N. 878; Sharp v. Waterhouse, 7 E. & B. 816; Tipping v. Eckersley, 2 K. & J. 273.

⁵ Hopper v. Lutkins, 3 Green Ch. 149.

⁶ Rawstron v. Taylor, 11 Exch. 369; Whitehead v. Parks, 27 L. J. Exch. 169.

it cannot pass by parol.¹ No water easement, however, will arise under a deed, giving a mere right of election to the grantee, unless the grantee exercises his election during his lifetime.² A covenant which is annexed to the realty becomes, upon a total breach, a mere personal right which remains with the covenantee or his personal representatives and does not pass with the land.³ Where a railroad company, having a license to change the course of a stream, agreed with the owner of a mill fed by the stream to dig a new channel and erect levees, it was held that, after the mill was conveyed to another, the purchaser could not maintain an action against the company for failure to fulfil the above provision in the manner agreed upon.⁴ A personal covenant made in general terms is to be construed, in determining whether there has been a breach, with such implied exceptions and qualifications as necessarily grow out of the subject-matter. If the stipulation be to supply an adjoining land-owner with water-power during regular working hours without exception, an occasional brief interruption, caused by ice or freshets, would not constitute a breach.⁵

§ 301. An easement is not presumed to be a mere personal right, or in gross, when it may fairly be regarded as appurtenant to some other estate;⁶ but if there is nothing connecting the privilege with such other estate, it does not pass with the land to an assignee.⁷ Where an upper tract

¹ *Bullen v. Runnels*, 2 N. H. 255; *Hall v. Chaffee*, 13 Vt. 170; *Tanner v. Volentine*, 75 Ill. 624; *Wood v. Edes*, 2 Allen, 580; *Seidensparger v. Spear*, 17 Maine, 123; *Clement v. Durgin*, 5 Greenl. 9; *Brand v. Doane*, 17 Conn. 402; *Fitch v. Seymour*, 9 Met. 462; *Smith v. Goulding*, 6 Cush. 154; *Seymour v. Carter*, 2 Met. 250; *Cobb v. Fisher*, 121 Mass. 170.

² *Vandenburgh v. Van Bergen*, 13 John. 212. See *Jackson v. Van Buren*, 13 Id. 525.

³ *Spencer's Case*, 1 Smith's Lead. Cas. 165.

⁴ *Junction Railroad Co. v. Sayers*, 28 Ind. 318.

⁵ *Mill-dam Foundry v. Hovey*, 21 Pick. 417, 442; *Green v. Kelley*, 3 Harr. (N. J.) 246; *Spencer*, 544. A covenant by a landed proprietor, not to permit the owner of an adjoining tract of land to cut a ditch through the grantor's premises, is not against public policy. *Jacobs v. Davis*, 34 Md. 204.

⁶ *Spensley v. Valentine*, 34 Wis. 154; *Dennis v. Wilson*, 107 Mass. 592; *Bank of North America v. Miller*, 24 Alb. Law Journ. 35.

⁷ *Ackroyd v. Smith*, 10 C. B. 164; *Linthicum v. Ray*, 9 Wall. 241; *Spencer v. Spencer*, 2 Ired. 96; *Moline Water Power Co. v. Waters*, 10 Brad.

of land was drained by ditches running through a lower tract, and the owner of both tracts conveyed the lower to J., excepting "a privilege of two leading ditches to T." and the following day conveyed to T. the upper tract without mentioning this privilege, it was held not to be annexed to the upper tract so as to pass with it to an assignee.¹ So, a covenant to repair a canal, dug for the purpose of draining the lands of the parties to the covenant, runs with such lands and binds a subsequent purchaser in fee.² A deed-poll which conveys to a railroad company for its road-bed the fee of a strip of land, and contains the condition subsequent "that the system of drainage shall remain the same as now, and ditches to remain of such a depth as to allow, as heretofore, the drainage of the land to the depth of five feet," does not create a covenant running with the land, and a new company, which purchases the road after the condition is violated, is not liable in damages to the grantor, in the absence of a personal covenant, for its mere failure to remove obstructions placed in the ditches by the first company.³

§ 302. Rights in watercourses created by deed may arise from real or from personal covenants. All covenants which relate to land and are for its benefit run with it and may be enforced by the heir to whom the land descends, or by each successive assignee into whose hands it may be come by conveyance or assignment.⁴ Thus a covenant by a lessor, or by one of the owners of two adjacent premises to supply the lessee or other owner with water, to raise a dam to a certain height, or to keep a dam and flume in good repair, passes to a subsequent assignee, who may sue thereon in his own name.⁵

(Ill.) 159, 178; *Haithcock v. Swift Island Manuf. Co.*, 72 N. C. 410.

¹ *Spencer v. Spencer*, 2 Ired. 96.

² *Norfleet v. Cromwell*, 74 N. C. 1.

³ *Hammond v. Port Royal Railway Co.*, 16 S. C. 567.

⁴ *Sharp v. Waterhouse*, 7 E. & B. 816; *Howard Manuf. Co. v. Water Lot Co.*, 53 Ga. 689; *Batavia Manuf.*

Co. v. Newton Wagon Co., 91 Ill. 230; *Norman v. Wells*, 17 Wend. 136.

⁵ *Jourdain v. Wilson*, 4 B. & Ald. 266; *Holmes v. Buckley*, Prec. in Chan. 39; 1 Eq. Cas. Ab. 27; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Noonan v. Orton*, 27 Wis. 272, 300; 4 Wis. 335; 22 Wis. 84; *Thompson v. Shattuck*, 2 Met. 615; *Hurd v. Curtis*, 7 Met. 94.

So, a covenant, in a grant of a watercourse, to clear it and keep it in repair, is a covenant running with the land of the grantor through which the watercourse passes.¹ A covenant, in a deed of a mill lot and a certain amount of water-power, by which the grantees were to pay their ratable share of the expenses of keeping the dam and raceway in repairs "in proportion to the number of square inches of water by them owned or used," and upon a failure to make such payments, the grantor should have the right to enter upon said lot to shut off the water until such payment should be made, runs with the land and binds all persons claiming under the deed.² The same is true of a covenant by which the proprietors upon opposite sides of a stream agree for themselves, their heirs, and assigns to rebuild a dam.³ Upon the other hand, in a lease of land, with liberty to make a watercourse and erect a mill, a covenant by the lessee, for himself, his executors, and assigns, not to hire persons settled in other parishes to work in the mill without a parish certificate, does not run with the land or bind the assignee of the lessee.⁴ A real covenant cannot pass independent of the land. It is not sufficient that it concerns the land, but in order to make it run therewith, there must be a privity of estate between the contracting parties.⁵ Where the owners of a mill-site and water privilege conveyed a portion thereof, and a few days afterwards entered into a contract with the grantees to erect and keep in repair at their joint expense a dam and flume for conducting water to their respective mills, it was held that, as the grantors had no estate in the land when the agreement was made, the contract was not a covenant which

¹ *Holmes v. Buckley*, Prec. in Chan. 39; 1 Eq. Cas. Ab. 27; *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 108 Mass. 175, 184; *Van Rensselaer v. Read*, 26 N. Y. 558, 574; *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489; *Carr v. Lowry*, 27 Penn. St. 257.

² *Wooliscroft v. Norton*, 15 Wis. 198.

³ *Lindeman v. Lindsey*, 69 Penn.

St. 93; *Jamison v. McCredy*, 5 Watts & S. 129.

⁴ *Congleton v. Pattison*, 10 East, 130.

⁵ *Spencer's Case*, 3 Co. 16; 1 *Smith's Lead. Cas.* (7th Am. Ed.) 137; *Webb v. Russell*, 3 T. R. 393; *Hurd v. Curtis*, 19 Pick. 459; *Plymouth v. Carver*, 16 Pick. 183; *Wheelock v. Thayer*, 16 Pick. 68; *Lynn v. Mount Savage Iron Co.*, 31 Md. 603.

ran with the mill-site.¹ So, where the defendant was bound by his joint and several bond to the owners of certain mills, dam and water power, and to the grantees of either or all the obligees in the bond, to complete the dam and keep it in repair for twenty years, it was held that the defendant's covenant was personal, he being a stranger to the title, and that, as the plaintiff, who was grantee of some of the owners, and brought suit for non-performance of the defendant's covenant, was not originally a party to the bond, there was neither privity of contract nor of estate, and that the action could not be maintained.² A reservation of the right to use water in a particular manner, for the accommodation of land which remains vested in the grantor, is an assignable interest, although the right is reserved to him without words of inheritance, and without naming his assigns.³ Covenants are as capable of running with incorporeal hereditaments as with those which are corporeal.⁴ An unsealed writing, signed by a former owner of the land, which purports to convey the right of flowing the same and to release all claim for damages therefor, does not bind the land, or estop subsequent grantees of the land to recover damages for the flowing thereof in future.⁵ So, a verbal license to enter and connect with a public drain does not run with the land.⁶

§ 303. When land is conveyed by deed, with covenants of warranty, the existence of outstanding easements which prevent the grantee having a clear title to the land conveyed is a breach of these covenants. Where the defendant conveyed to the plaintiff, with covenants of warranty and seisin, a tract of land having a spring thereon, and had previously granted to another the right to the water to the spring, and of drawing it away by an aqueduct to his premises, there

¹ *Wheeler v. Schad*, 7 Nev. 204; *Vern.* 421; 1 Bro. P. C. 30; *Merri-*
Turget v. Lloyd, 2 Vent. 277; *Mitchell*
v. Warner, 5 Conn. 497. *man v. Russell*, 2 Jones Eq. 470.

² *Lyon v. Parker*, 45 Maine, 474.

³ *Kennedy v. Scovil*, 12 Conn. 317,
326; 14 Conn. 62; *Morse v. Aldrich*,
19 Pick. 449; *London v. Richmond*, 2

⁴ *Baldy v. Wells*, 3 Wils. 26;
Sterling Hydraulic Co. v. Williams,
66 Ill. 393.

⁵ *Cobb v. Fisher*, 121 Mass. 169.

⁶ *Estes v. China*, 56 Maine, 407.

was held to be a breach of the covenants in the plaintiff's deed.¹ If a man buys land which is covered with water, the water is not necessarily an incumbrance in the legal sense of the word, and it is not a breach of a general covenant against incumbrances that, prior to the conveyance, the grantor had lawfully erected a dam and thereby caused water to flow upon the granted premises;² or that a third person has, by means of a dam erected on land not belonging to the grantor, openly and notoriously flowed a portion of the land for a sufficient period to create a prescriptive right.³ The existence of a right in the mill-owner to cleanse the natural channel of the stream, and to remove obstructions to the free flow of the water from the mill, is not an incumbrance within the meaning of a covenant in a deed describing the grant as land "through which the water to a mill passes."⁴ If a mill and water privilege are excepted in a grant of land bounding upon a stream, the exception includes the right to flow the land so far as may be necessary or has been customary, and the existence of this easement is not a breach of a covenant against incumbrances.⁵ If mill property is granted with the privilege of raising the waters of a creek to a specified height to furnish power for the mill, and the raising of the water to that height will render the grantee liable in damages for flowage, the measure of damages for breach of the covenant of seisin in the deed is the difference between the value, at the time of the purchase, of the privilege of maintaining the water at the height specified, and the value of the right to maintain the water to the height at which the grantee can rightfully keep it.⁶ Upon the conveyance of a piece of land by metes and bounds which was described as "containing two acres, more or less, and embraces all the mill privilege on the Rochester side of said falls," it was held that the word "embraces" was not a term of grant, and that there was not a covenant that a mill

¹ Clark v. Conroe, 38 Vt. 469;
Lamb v. Danforth, 59 Maine, 322.

² Kidder v. George, 18 N. H. 511.

³ Kurtz v. McCune, 22 Wis. 628;
Alexander v. Kerr, 2 Rawle, 83;
Knapp v. White, 23 Conn. 529.

⁴ Prescott v. Williams, 5 Met. 429.

⁵ Pettee v. Hawes, 13 Pick. 323;
Davis v. Wilson, 6 Cush. 206.

⁶ Hall v. Gale, 20 Wis. 292.

privilege existed within the boundaries of the land.¹ A State grant of a mill-site with no mill or dam in existence confers no right, unless expressly granted, to flow adjoining State lands as against subsequent purchasers, although such purchasers acquire title after the erection of the dam, under patents referring to a map which represents their lands as flowed to the extent claimed.²

§ 304. Grants relating to water may include a certain quantity of the water itself, having reference to its bulk or weight, or to the quantity which will pass through an aperture of known dimensions in a certain time,³ or it may be of such water-power as is necessary to propel certain machinery. In the latter case, no property is acquired by virtue of the grant in the corpus of the water; others are not deprived of the right to use it in such manner as does not impair the power;⁴ nor is it necessary that it should be annexed to a mill or limited in location.⁵ Rights of water thus conveyed are distinct and substantive subjects of grant, and, although in their nature appertaining to land, they may exist without any restriction as to their use in connection with the land granted, or any other designated parcel, and stand precisely as if granted by deeds containing no conveyance of land.⁶ If the right is granted in a single deed to build a dam on the grantor's land, to enter for repairs, and to flow the grantor's land to a specified point, the privilege of flowing may be exercised independently by a dam erected on land other than the grantor's.⁷ If land is granted with the right, should it become necessary, to erect a dam on the land of the grantor, in order that the grantee may have "the best possible use of the water of a stream for running machinery," the dam need not be maintained at the place where it is first erected, but

¹ *Pray v. Great Falls Manuf. Co.*, 681; *Society v. Holsman*, 1 Halst. Ch. 38 N. H. 442.

² *Colvin v. Burnet*, 2 Hill, 620.

³ *Canal Co. v. Hill*, 15 Wall. 94; *Bardwell v. Ames*, 22 Pick. 333.

⁴ *Mayor v. Commissioners*, 7 Penn. St. 348; *Schuylkill Navigation Co. v. Moore*, 2 Wharton, 477; *Vermont Central Railroad Co. v. Hills*, 23 Vt.

⁵ *Hurd v. Curtis*, 7 Met. 94, 114.

⁶ *De Witt v. Harvey*, 4 Gray, 486; *Pratt v. Lamson*, 2 Allen, 275; *Schuylkill Navigation Co. v. Moore*, 2 Whart. 477.

⁷ *Kilgore v. Hascall*, 21 Mich. 502.

the grantee is at liberty to erect and maintain the dam upon his own land.¹ A conveyance of all the water of a river between certain points "for the purposes and use of machinery or ditches, or for any other uses," does not convey the land of a mill-site on the stream.²

§ 304 *a*. "A grant of a watercourse in law," says Jessel, M. R.,³ "especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water, it may mean the channel-pipe or drain which contains the water, and it may mean the land over which the water flows. What it does mean must be shown by the context, and if there is no context, I apprehend that it would not mean anything but the easement, a right to the flow of the water." A grant of a "pool," or "gulf," or of a "pond" passes the land which is covered with water.⁴ So a grant of a "well," or "spring," or "wharf" is effectual to pass the soil as well as the water.⁵ Upon the sale of a division of a canal belonging to the State of Indiana, "including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging," certain adjoining parcels of land belonging to the grantor, which were necessary to the use of the canal and water-power, and were used with it at the time, but were not clearly described by the above terms, was held to pass by the conveyance.⁶ A lease of a riparian lot "with all the improvements thereon made" will cover an addition by filling and natural accretion, which the lessor might, by statute, have lawfully made at the date of the lease.⁷

¹ *Barber v. Nye*, 65 N. Y. 211.

² *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44.

³ *Taylor v. St. Helens*, 6 Ch. D. 264, 271. See *Jackson v. Halstead*, 5 Cowen, 216; *Egremont v. Williams*, 11 Q. B. 707.

⁴ *Co. Lit.* 5; *Goodrich v. Eastern Railroad*, 37 N. H. 149, 164.

⁵ *Johnson v. Rayner*, 6 Gray, 107; *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159. A sale of a "pier," or

"wharf," carries the right of wharfage. *Wiswall v. Hall*, 3 Paige, 313; *Smith v. New York*, 68 N. Y. 552.

"Wharf" will include adjacent flats. *Ashby v. Eastern Railroad Co.*, 5 Met. 368. See *Buszard v. Capel*, 8 B. & C. 141; *Owen v. Field*, 102 Mass. 90; *Mixer v. Reed*, 25 Vt. 254; *Woodcock v. Estey*, 43 Vt. 515.

⁶ *Sheets v. Selden*, 2 Wall. 177.

⁷ *Williams v. Baker*, 41 Md. 523.

§ 305. If a "mill" be granted, reserved, or devised,¹ either with or without the word "appurtenances," it includes not only the mill itself, but the land under it and so much of the land adjacent to it as is necessary to its use or commonly used in connection with it;² also, the fixtures used in operating the mill, including its machinery, with the bars and chains, in use or in their appropriate position at the time of the conveyance,³ and the water privileges appurtenant to the mill as corporeal hereditaments.⁴ But this right to continue the flooding of the grantor's lands to the same extent as when the grant was made, does not apply to grants of land from the government.⁵ A grant of land, on which a mill stands, passes a raceway which is necessary for the convenient working of the mill,⁶ but not the right to dig a new trough on the grantor's adjoining dry land for the purpose of conducting water to the mill, although the deed purports to convey "the right of digging, damming, and flowing for the accommodation of said mill."⁷ So the con-

¹ *Bacon v. Bowdoin*, 22 Pick. 401; *Webster v. Potter*, 105 Mass. 414; *Blaine v. Chambers*, 1 Serg. & R. 169. See *Harlan v. Moore*, 9 Watts, 360.

² *Furbush v. Lombard*, 13 Met. 109; *Farrar v. Cooper*, 34 Maine, 394; *Esty v. Baker*, 48 Maine, 495; *Crosby v. Bradbury*, 20 Maine, 61; *Whitney v. Olney*, 3 Mason, 280; *Auburn Congregational Church v. Walker*, 124 Mass. 71; *Leonard v. White*, 7 Mass. 6; *Van Horn v. Richardson*, 24 Wis. 245; *Lanoue v. McKinnon*, 19 Kansas, 408. The same rule applies to exceptions in a grant. *Moulton v. Trafton*, 64 Maine, 222.

³ *Farrar v. Stackpole*, 6 Greenl. 154; *Lampman v. Milks*, 21 N. Y. 510; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57.

⁴ *Blake v. Clark*, 6 Greenl. 436; *Maddox v. Goddard*, 15 Maine, 218; *Baker v. Bessey*, 73 Maine, 472, 478; *Seavey v. Jones*, 43 N. H. 441; *Miller v. Miller*, 15 Pick. 57; *Pettee v. Hawes*, 13 Pick. 323; *Prescott v. White*, 21 Pick. 341; *Crittenden v.*

Field, 8 Gray, 621; *Hapgood v. Brown*, 102 Mass. 453; *Richardson v. Bigelow*, 15 Gray, 146; *Frink v. Branch*, 16 Conn. 260, 273; *Smith v. Moodus Water Power Co.*, 35 Conn. 392; *Brugger v. Butler*, 6 Oregon, 459; *Bank v. Miller*, 7 Sawyer, 163, 170; *Gibson v. Brockway*, 8 N. H. 465; *Wickersham v. Bills*, 8 Ind. 387; *Hadden v. Shoutz*, 15 Ill. 581; *Leggett v. Kerton*, 2 Rich. (S. C.) 156; *Page v. Esty*, 54 Maine, 319; *Wall v. Cloud*, 3 Humph. 181; *Neadershouser v. State*, 28 Ind. 257; *Simmons v. Cloonan*, 81 N. Y. 557; *Hill v. National Bank*, 97 U. S. 450. See *Swasey v. Brooks*, 30 Vt. 692; 34 Vt. 451; *Spaulding v. Abbott*, 55 N. H. 423.

⁵ *Wilcoxon v. McGehee*, 12 Ill. 381.

⁶ *New Ipswich Factory v. Bachelor*, 3 N. H. 190; *Babcock v. Utter*, 1 Abb. Dec. 27; 1 Keyes, 115, 397; *Hannum v. Westchester*, 70 Penn. St. 367; *Jackson v. Louw*, 9 Johns. 298; *Eschelman v. Snyder*, 82 Ind. 498.

⁷ *Miller v. Bristol*, 12 Pick. 550.

veyance of "ferry ways," which are permanent structures, includes the land under them and used with them;¹ and the grant of a "water ditch" will include another water ditch by which it is fed and without which it would be useless.² The term "mill-site" is sufficient to pass the mill, the water-power immediately connected therewith, and the right to use it by the erection of a dam;³ but the grant of the "liberty" or "privilege" of using the waters of a stream,⁴ or the conveyance of a right of way over land for a mill-race,⁵ is the grant of an easement only, and not of a fee. The grant of a "dam" includes an easement in the mill-pond.⁶ While a conveyance of land transfers whatever is properly and lawfully appurtenant to the subject of the grant, it does not convey an easement, such as the flowage of a stranger's land, which has no valid existence as such, although it may appear, as matter of fact, to be attached to the land; and what the deed does not purport to convey, the ordinary covenants of warranty do not warrant.⁷ Where certain land was conveyed by metes and bounds, without mention of a mill, dam, or water privilege of any kind, and the grantee had previously constructed a mill and dam upon the land, which flowed other land of the grantor, it was held that the

¹ *Gerrish v. Gary*, 120 Mass. 132.

² *Donnell v. Humphreys*, 1 Mon. 518.

³ *Stackpole v. Curtis*, 32 Maine, 383; *Curtis v. Smith*, 35 Conn. 158; *Wood v. Sawin*, 4 Gray, 322; *Le Roy v. Bradley*, 4 Paige, 77; *Tabor v. Bradley*, 18 N. Y. 113. But not a reservoir dam above, belonging to the grantor, but not within the boundaries named in the deed. *Brace v. Yale*, 4 Allen, 393. See, however, *Elliott v. Shepherd*, 25 Maine, 371. The term "mill-dam" does not include a dam built at the outlet of a lake to raise the waters for purposes of navigation, although used to propel mills. *Arimond v. Green Bay Canal Co.*, 35 Wis. 41. A river bank, or a structure built to support a break in such bank, is not a dam so as to render a person

who injures it liable under a statute which provides a penalty against those who injure dams, unless such injury draws off the water of a mill-pond. *People v. Gage*, 23 Mich. 93. See *Burnham v. Kempton*, 44 N. H. 78; *Colwell v. May's Landing Co.*, 4 C. E. Green, 245.

⁴ *Hadley v. Hadley Manuf. Co.*, 4 Gray, 140; *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen, 159.

⁵ *Miller v. Vaughn*, 8 Oregon, 333.

⁶ *Maddox v. Goddard*, 15 Maine, 218; *Sabine v. Johnson*, 35 Wis. 185; *Hutchinson v. Chicago Railway Co.*, 37 Wis. 582, 604.

⁷ *Green v. Collins*, 86 N. Y. 246; *Adams v. Conover*, 87 N. Y. 422; *Brace v. Yale*, 4 Allen, 393; *Illinois Central Railroad Co. v. Wren*, 43 Ill. 77.

grantee did not acquire the right of flooding the grantor's land, it not appearing that the grantor knew of the existence of the mill or dam when the deed was executed.¹

§ 306. The grant of water easements carries with them by implication, as secondary or subsidiary easements, everything that is beneficially necessary or incident to the grant, whether mentioned or not as "privileges," "appurtenances," or the like.² A distinction has been made between an easement reserved in land granted for the benefit of the land retained, and an easement granted in other land of the grantor for the benefit of that conveyed, it being intimated that there might be implied a grant of an easement under circumstances where there would be held to be none of a reserved easement.³ But there must be a reasonable necessity for such an implication,⁴ mere convenience not being enough,⁵ and the use must be seasonable.⁶ What will pass as impliedly appurtenant to the easement granted is a question for the jury.⁷ Of two constructions that will be selected which gives to such appurtenant privileges the more convenient and reasonable mode of enjoyment.⁸ The grantor will have a right to elect, where there are several modes of use or enjoyment, in default of which the grantee may choose.⁹ The use of such an appurtenant right will

¹ *Tabor v. Bradley*, 18 N. Y. 109.

² *Pomfret v. Ricroft*, 1 Wms. Saund. 321, 323, and note 6; *Hodgson v. Field*, 7 East, 613, 622; *Hunchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; *Osborn v. Wise*, 7 C. & P. 761; *Dodd v. Burchell*, 1 H. & C. 118; *United States v. Appleton*, 1 Sumner, 491, 501; *Grant v. Chase*, 17 Mass. 443, 448; *Hazard v. Robinson*, 3 Mason, 272, 276; *Whitney v. Olney*, 3 Mason, 280; *Kent v. Waite*, 10 Pick. 138; *Oliver v. Dickinson*, 100 Mass. 114, 117; *Hollenbeck v. McDonald*, 112 Mass. 247, 250; *Rackley v. Sprague*, 17 Maine, 281; *Maddox v. Goddard*, 15 Maine, 218; *Wyman v. Farrar*, 35 Maine, 64; *Hammond v. Woodman*, 41 Maine, 177; *Pickering v. Stapler*, 5 Serg. & R. 107;

Swartz v. Swartz, 4 Penn. St. 353. That a grant of land includes rents for an easement to flow the granted premises, see *Pollock v. Cronise*, 12 How. Pr. 363.

³ *Johnson v. Jordan*, 2 Met. 234.

⁴ *Brigham v. Smith*, 4 Gray, 297; *Leonard v. Leonard*, 2 Allen, 543; *Pettingill v. Porter*, 8 Allen, 1; *Parker v. Bennett*, 11 Allen, 388; *Oliver v. Pitman*, 98 Mass. 46.

⁵ *Nichols v. Luce*, 24 Pick. 102; *White v. Leeson*, 5 H. & N. 53; *post*, § 362.

⁶ *Tomlin v. Fuller*, 1 Ventr. 48.

⁷ *Hall v. Benner*, 1 Penn. 402.

⁸ *Morris v. Edginton*, 3 Taunt. 24; *Dand v. Kingscote*, 6 M. & W. 174.

⁹ *Holmes v. Seely*, 19 Wend. 507.

vary as the necessity varies,¹ and when the necessity for such an implied easement ceases, the right to its enjoyment will also end.²

§ 307. The grant of a "mill privilege" or "privilege of a mill" will include the land on which the mill and its appendages stand, and the land and water actually and commonly used therewith and necessary to its enjoyment,³ including, as well the water in the raceway,⁴ as a right to receive or discharge the water from the mill by an existing raceway through other land of the grantor.⁵ Mere distance between the principal thing and the incident to be enjoyed is immaterial; and the continued existence of a dam has been deemed essential to the beneficial enjoyment of a mill, although at a distance of three-quarters of a mile.⁶ A conveyance of a water right includes the necessary use of land for the foundation of a "dam";⁷ if of a "dam" in a grant of land with a stream through it, together with a dam, a flume, and a conductor upon it, it will be construed to cover, or as being equivalent to "flume";⁸ and if of "mills and dam," it will include the flowage of the grantor's land as then flowed,⁹ or as it must inevitably be flowed by their fair and proper use,¹⁰ as by a tightening or necessary raising of the dam to secure a sufficient head.¹¹ A grant "of all the land which the dam flows" conveys the land flowed when the dam is in use, and not when the water runs to waste as if no dam existed.¹² Where a "saw-mill," without further description,

¹ Seeley v. Bishop, 19 Conn. 128.

² Holmes v. Goring, 2 Bing. 76; Viall v. Carpenter, 14 Gray, 126; Collins v. Prentice, 15 Conn. 39, 423; Pierce v. Selleck, 18 Conn. 321.

³ Moore v. Fletcher, 16 Maine, 63.

⁴ Wetmore v. White, 2 Caines' Cas. 87; Strickler v. Todd, 10 Serg. & R. 63; Morgan v. Mason, 20 Ohio, 401, a case of a judgment sale. That an injury to a raceway is an injury to the mill, see Butz v. Ihrie, 1 Rawle, 218.

⁵ New Ipswich Woolen Factory v. Batchelder, 3 N. H. 190; Morgan v.

Mason, 20 Ohio, 401; Elliott v. Sallee, 14 Ohio St. 10; Ely v. Stewart, 11 Md. 408.

⁶ Perrin v. Garfield, 37 Vt. 304.

⁷ Conwell v. Brookhart, 4 B. Mon. 580, 584.

⁸ Kennedy v. Scovil, 12 Conn. 317.

⁹ Preble v. Reed, 17 Maine, 169; Hills v. Dey, 14 Wend. 204; Kestler v. Verble, 7 Jones (N. C.) 185.

¹⁰ Butler v. Huse, 63 Maine, 447; Albee v. Hayden, 25 Minn. 267.

¹¹ Brugger v. Butler, 6 Oregon, 459.

¹² Morse v. Marshall, 11 Allen, 229.

was assigned to one of several heirs as his portion of an estate, it was decided that he was entitled to the use of the head of water, and of any further easement theretofore used with it or necessary to its enjoyment,¹ and the same was held in a State where a strict division of an estate, under the statute of descents, gave the land upon which a mill stood to one heir, while the dam used in connection with it covered a portion of a part allotted to another.²

§ 308. If a "saw-mill" is conveyed "with a convenient privilege to pile logs, boards, or other lumber," an easement results in the land used for the purpose of piling the product of the mill,³ and a right to the use of a mill-pond carries the privilege to float logs in it for mill use.⁴ The grant of a privilege in a ditch or watercourse has been held, under the circumstances, to include a right to cut a trench through the land of another, if in that way only it could be beneficially used.⁵ Where a lease of a mill was granted to one who was described as a "bleacher" and the premises were described as "late in the occupation of P.," who was a bleacher, and had been wont to pollute the stream by discharging the refuse of his mill therein, it was held that the lessee could discharge refuse from his works into the stream in the same manner that P. had formerly done, as against a subsequent vendee of the lessor of this and another mill, in the latter of which such vendee carried on the business of paper maker.⁶

§ 309. A grant of a right to use water as "accustomed to do" will include all of that so used, whether such customary use had ripened into a strict right or not,⁷ but a custom of the owner of a lot to vary the course of a stream upon it to meet the emergencies of his business of brick-making, but without at any time preventing its traversing the whole lot,

¹ *Blake v. Clark*, 6 Greenl. 436.

² *Kilgour v. Ashcom*, 5 H. & John.

82.

³ *Thompson v. Androscoggin Bridge*, 5 Greenl. 62; *Thompson v. Banks*, 43 N. H. 540.

⁴ *Beals v. Stewart*, 6 Lans. 408.

⁵ *Dyer v. Depui*, 5 Wharton, 584.

⁶ *Hall v. Lund*, 1 H. & C. 676.

⁷ *Avon Manuf. Co. v. Andrews*, 30 Conn. 476.

creates no easement in one portion against another, so as to give one of his heirs, to whom in a division of the lot the upper portion came, a right to wholly divert it from flowing through the lower portion of the lot.¹ A conveyance of one of two ancient mills, *eo nomine*, which comprise the entire mill privileges of a stream, carries with it such a proportion of the whole right in the stream as the water used to drive the mill conveyed bears to that used by the other mill; while a modern grant of such a mill, situated on a stream where there were several mills of different kinds, all drawing from the same level, and where there was only sufficient water to supply the power necessary to drive each mill, passes nothing but the mill itself, and the water actually necessary to drive it.²

§ 310. A grantor may withhold easement privileges in water, either by way of reservation or exception,³ which become binding upon the grantee upon his acceptance of the deed,⁴ cover what is excluded from the grant,⁵ and, in the case of an exception, enure to the benefit of his heirs and assigns without words of inheritance,⁶ unless it is plain that an exception in favor of the grantor only is intended.⁷ While an exception is defined to be some existing part taken out of the premises conveyed, and a reservation as some new thing carved out of the granted premises by the conveyance,⁸ the words are often used indiscriminately, and

¹ Macomber v. Godfrey, 108 Mass. 219.

² Crittenden v. Field, 8 Gray, 621, 627.

³ Wade v. Howard, 6 Pick. 492; Knox v. Silloway, 10 Maine, 201; Coheco Manuf. Co. v. Whittier, 10 N. H. 305; Bowen v. Conner, 6 Cush. 132, 136; Barnes v. Lloyd, 112 Mass. 224, 232; Peck v. Conway, 119 Mass. 546, 549.

⁴ Newell v. Hill, 2 Met. 180; Vickerie v. Buswell, 13 Maine, 289; Emerson v. Mooney, 50 N. H. 315.

⁵ Greenleaf v. Birth, 6 Pet. 302, 310; Mower v. Hutchinson, 9 Vt. 242.

⁶ Winthrop v. Fairbanks, 41 Maine, 307; Emerson v. Mooney, 50 N. H. 315; Keeler v. Wood, 30 Vt. 242; Wheeler v. Brown, 46 Penn. St. 197. See Memphis & St. Louis Packet Co. v. Grey, 9 Bush, 137.

⁷ Jamaica Pond Aqueduct Co. v. Chandler, 9 Allen, 159, 170, citing Shep. Touchstone, 100; Curtis v. Gardner, 13 Met. 461. See Buffum v. Hutchinson, 1 Allen, 58.

⁸ Case v. Haight, 3 Wend. 632; Winthrop v. Fairbanks, 41 Maine, 307; Garland v. Hodsdon, 46 Maine, 511.

effect will be given to the intention of the parties irrespective of the words employed.¹ Thus, where a conveyance to A. was of a portion of certain land, and a right to maintain a dam on the rest, a subsequent grant to B. of the whole parcel, "reserving" all the rights of A., his heirs and assigns therein, was held to create an exception, and not a reservation.² If the water in a well is ample for the use of both parties, the words "reserving to myself the use of the well in front of the granted premises" create a reservation merely.³ In the case of a reservation, as of a mill-site, the whole premises vest in the grantee until the grantor or his assigns exercise the right reserved,⁴ and a power of revocation of an easement, reserved in a demise, is valid and may be exercised partially as well as wholly.⁵

§ 311. An exception or reservation of a water right will be construed most strictly against the grantor, and most beneficially for the grantee.⁶ Thus, where a grantor in a deed of land, with a right to take water for machinery from a dam, reserved "sufficient water at all times to work" the tannery wheels, "as now used," it was determined that the water so reserved was the quantity actually used by the tannery at the time the deed was given, and not its capacity.⁷ If an exception does not clearly designate the particular portion meant of the property conveyed, it fails for uncertainty.⁸ In a grant of land "excepting one acre and one-half acre, which is reserved for the use and flowing of water for the

¹ *Coheco Manuf. Co. v. Whittier*, 10 N. H. 305; *Cutter v. Tufts*, 3 Pick. 272; *Bowen v. Conner*, 6 Cush. 132, 135; *Hill v. Cutting*, 107 Mass. 597; *Bowman v. Wathen*, 3 McLean, 366. *Hurd v. Curtis*, 7 Met. 94, held the words "except the reserve" to be equivalent to "except and reserve."

² *Stockwell v. Couillard*, 129 Mass. 231.

³ *Barnes v. Burt*, 38 Conn. 541.

⁴ *Dygart v. Matthews*, 11 Wend. 35; *Newmarket Manuf. Co. v. Pendergast*, 24 N. H. 54. See *Thompson v. Gregory*, 4 John. 81.

⁵ *Ex parte Miller*, 2 Hill, 418.

⁶ *Case v. Haight*, 3 Wend. 632; *Howard v. Wadsworth*, 3 Greenl. 471.

⁷ *Wyman v. Farrar*, 35 Maine, 64.

⁸ *Co. Litt.* 142a; *Hull v. Leonard*, 1 Pick. 31; *Wusthoff v. Dracourt*, 3 Watts, 240. A deed from A. to B. with the words "C.'s mill-seat excepted" conveys no title to C. beyond an easement therein for a mill-site, a dam, and a flowage right. *Everett v. Dockery*, 7 Jones (N. C.) 390. See *Memphis & St. Louis Packet Co. v. Grey*, 9 Bush, 137.

mill," the exception was decided to be void for uncertainty.¹ In a reservation of streams, a right to build dams, and of such land as might be flowed thereby in the granted premises, the reservation is inoperative until the grantor exercises the right by the erection of dams, and, if viewed as an exception strictly, it is void for uncertainty.²

§ 312. It is clear that an exception or reservation of something not embraced in the premises conveyed would be simply void, there being nothing for it to operate upon.³ Where a riparian owner conveyed to one a parcel of land with certain water rights, "except the reserve of the right and privilege of conveying water through the premises hereby granted and conveyed, in the channel now open, in which water used to run to a saw-mill, for the purpose of carrying such water-works as the grantor may wish to erect on his premises adjoining the premises hereby conveyed, with the right of widening said channel, not exceeding sixteen feet, and of deepening the same," and subsequently conveyed to another a parcel of land with certain water rights and "all the rights, privileges, benefits, and interest in and to the exceptions and reservations which said grantor excepted and reserved" by the prior deed, it was held that such grant of the grantor's excepted rights in the former deed did not enlarge the water rights released to the grantee in the latter conveyance.⁴ Any restrictions placed by a grantor upon a grantee respecting the use of water, or rights in and to water, must be clear and unambiguous, and not repugnant to the grant.⁵ An exception or reservation of a mill in a grant of land includes not only the land beneath it, but whatever is necessary to its beneficial use as an appurtenant water privilege,⁶

¹ *Darling v. Crowell*, 6 N. H. 421.

² *Thompson v. Gregory*, 4 Johns. 81.

³ *Hurd v. Curtis*, 7 Met. 94, 110;
Cocheco Manuf. Co. v. Whittier, 10
N. H. 305.

⁴ *Hurd v. Curtis*, 7 Met. 94.

⁵ *Lambert v. Bennet*, 3 Smith, 34;
Cutter v. Tufts, 3 Pick. 272; *Sprague*

v. Snow, 4 Pick. 54; *Jewett v. Ricker*,
68 Maine, 377; *Denton v. Leddell*, 23
N. J. Eq. 64.

⁶ *Allen v. Scott*, 21 Pick. 25; *Ham-*
mond v. Woodman, 41 Maine, 177,
203; *Moulton v. Trafton*, 64 Maine,
218.

land sufficient for a mill-pond,¹ and a right of flowing land so far as may be necessary,² words in a grant that are effective to pass being equally effective to except.³ If the exception is for so long "as the said grantee occupies said privilege with mills," the existence of the mills marks the limit.⁴ A reservation of "all watercourses suitable for the erection of mills" gives a right to all the mill-sites on the granted land, whenever the grantor chooses to make a location,⁵ for all purposes that he may choose,⁶ including, however, natural, not artificial, mill-sites.⁷ A reservation to a grantor, and to his heirs and assigns, of a certain water privilege for the benefit of his saw-mill, cannot be availed of by a grantee of other land of his, but not of the saw-mill, for any purpose.⁸

§ 313. When the dominant estate and servient estate become united in the person of the same owner, easements in and to the use of water resting upon the latter in favor of the former become extinguished.⁹ A natural watercourse, however, which is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as parcel of it, is never extinguished or suspended by such unity of possession.¹⁰ If, however, the owner, after unity of possession, does not interrupt existing easements in the use or enjoyment of water, a subsequent grant by him of either

¹ *Jackson v. Vermilyea*, 6 Cowen, 677. In *Gregg v. Birdsall*, 53 Barb. 402; 35 How. Pr. 345, where there was a reservation for sawing lumber and of flowage for that purpose, the latter right was held co-extensive with the former.

² *Pettee v. Hawes*, 13 Pick. 323; *Vickerie v. Buswell*, 13 Maine, 289.

³ *Blake v. Madigan*, 65 Maine, 522.

⁴ *Moulton v. Trafton*, 65 Maine, 218. See *Esty v. Currier*, 98 Mass. 500; *Linthicum v. Ray*, 9 Wall. 241.

⁵ *Russell v. Scott*, 9 Cowen, 279; *Butz v. Ihrie*, 1 Rawle, 218.

⁶ *French v. Carhart*, 1 Comst. 96.

⁷ *Armstrong v. Masten*, 11 Johns. 189.

⁸ *Judd v. Wells*, 12 Met. 504.

⁹ *Lady Brown's case* cited in *Sury v. Pigot*, Popham, 166, 170; *Palmer*, 444, 446; *Canham v. Fisk*, 2 Cr. & J. 126; *Thomas v. Thomas*, 2 Cr. M. & R. 34; *Ivimey v. Stocker*, L. R. 1 Ch. 396, 407; *Ritger v. Parker*, 8 Cush. 145; *Atwater v. Bodfish*, 11 Gray, 151; *Stevens v. Dennett*, 51 N. H. 324, 330; *Kieffer v. Imhoff*, 26 Penn. St. 438, 443; *Pearce v. McGlenaghan*, 5 Rich. (S. C.) 178; *McAllister v. Devane*, 76 N. C. 57.

¹⁰ *Woolrych*, Waters, 234; *Bul. N. P.* 74; *Hazard v. Robinson*, 3 Mason, 272; *Johnson v. Jordan*, 2 Met. 239; *Tucker v. Jewett*, 11 Conn. 311; *ante*, § 204.

estate, or any portion of either, will carry therewith all the water privileges and burdens existing at the time of the conveyance.¹ Where the owner of the lower of two mills on a stream lowered his dam, which flowed back the water upon the upper mill, and thus freed the upper mill from obstruction for thirty-eight years, when he sold his mill to the upper owner, it was held that the lapse of time and unity of possession had extinguished the right to again raise the dam two feet in height, and that the upper mill had a right to be kept free from obstruction.² An upper and lower owner, although occupying the relation of grantor and grantee, must each use the water in a reasonable and proper manner, irrespective of the use prior to the conveyance.³

§ 314. Easements which are necessary to the enjoyment of an estate, such as gutters and drains, and are called continuous easements, do not, like discontinuous easements,⁴ come to an end by mere unity of possession, but they will revive on severance,⁵ like ways of necessity,⁶ because they are subsisting easements, provided the necessity for them has not ceased,⁷ unless the owner during the unity has by some positive act shown his desire to no longer enjoy them.⁸ The unity of title and possession, such as will extinguish an easement in

¹ *Nicholas v. Chamberlain*, Cro. Jac. 121; *Morris v. Edginton*, 3 Taunt. 24; *Pyer v. Carter*, 1 H. & N. 916; *Elliott v. Sallee*, 14 Ohio St. 10; *Grant v. Chase*, 17 Mass. 443; *Philbrick v. Ewing*, 97 Mass. 133; *Seymour v. Sage*, 13 N. J. Eq. 439; *Perry v. Parker*, 1 Woodb. & M. 280; *Manning v. Smith*, 6 Conn. 289; *Dunklee v. Wilton Railroad Co.*, 24 N. H. 489. See *Cary v. Daniels*, 8 Met. 466.

² *Hazard v. Robinson*, 3 Mason, 272. See *Brace v. Yale*, 4 Allen, 393. See also *Seeley v. Bridges*, 13 Neb. 547.

³ *Barrett v. Parsons*, 10 Cush. 367; *Haskins v. Haskins*, 9 Gray, 390.

⁴ *Worthington v. Gimson*, 2 El. & El. 618; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761. See *Jamaica*

Pond Aqueduct v. Chandler, 9 Allen, 159, 164; *Durel v. Boisblanc*, 1 La. Ann. 407.

⁵ *Sury v. Pigot*, Popham, 166; *Palmer*, 444; *Pheysey v. Vicary*, 16 M. & W. 484; *Hazard v. Robinson*, 3 Mason, 272; *Lampman v. Milks*, 21 N. Y. 505.

⁶ *Clark v. Cogge*, Cro. Jac. 170; *Jorden v. Atwood*, Owen, 121; *Holmes v. Goring*, 2 Bing. 83. See *Proctor v. Hodgson*, 10 Exch. 824.

⁷ *Viall v. Carpenter*, 14 Gray, 126; *Collins v. Prentice*, 15 Conn. 39, 423; *Pierce v. Selleck*, 18 Conn. 321; *Seeley v. Bishop*, 19 Conn. 128.

⁸ *Copie v. I. de B.* 11 Hen. 7, 25; *Robins v. Barnes*, Hob. 131; *Pyer v. Carter*, 1 H. & N. 916, 921. See *Dodd v. Burchell*, 1 H. & C. 113.

the beneficial use of water, must be of an estate in fee in both the dominant and the servient tenements in the same person. Thus the possession by the same person of one parcel of land in fee and another for the term of five hundred years, the one of which had an easement for drip in the other;¹ the vesting of two estates in the same person as mortgagee without foreclosure,² and the holding an estate in a dock in fee by a defective title, and an easement in the same by a valid title,³ have all been held insufficient to extinguish the easement. If an owner on one side of a stream of half the water privilege is also the owner as a tenant in common of an undivided part of the other half, it is not such a unity of possession as will extinguish in whole or in part the water easement of the tenants in common.⁴ If A. enjoys adversely a water easement in adjoining land, and before it ripens into a right conveys to the adjoining owner, who shortly reconveys to A., who again enjoys the easement as before for a period less than, but, with the former period, exceeding the statutory limit, he gains no right to the easement by user, by reason of the former unity of possession in himself.⁵ An easement in a watercourse may also be extinguished by operation of law, as by filling it up and laying out over it a highway.⁶

§ 315. Tenants in common of watercourses or other water rights may, as of right at the common law, have partition of the whole property so held regardless of the difficulty, hardship, or inconvenience resulting from so doing.⁷ This partition need not necessarily be by metes and bounds, although the land covered by water, or used in connection therewith, may be so divided, but the extent of water or water privilege assigned may be marked by visible monuments, noting the rise and fall, by controlling the flowage

¹ *Thomas v. Thomas*, 2 C., M. & R. 34. See *Kavanagh v. Coal Mining Co.*, 14 Ir. C. L. 82.

² *Ritger v. Parker*, 8 Cush. 145.

³ *Tyler v. Hammond*, 11 Pick. 193.

⁴ *Bliss v. Rice*, 17 Pick. 23; *Atlanta Mills v. Mason*, 120 Mass. 244, 251.

⁵ *Manning v. Smith*, 8 Conn. 289.

⁶ *Hancock v. Wentworth*, 5 Met. 446; *Wright v. Freeman*, 5 H. & John. 467.

⁷ *Hanson v. Willard*, 12 Maine, 142; *Smith v. Smith*, 10 Paige, 470; *Morrill v. Morrill*, 5 N. H. 134. *Doan v. Metcalf*, 46 Iowa, 120, seems to intimate that partition is confined to cases where "practicable."

through gates, by designating the number of inches to which each partitioner is entitled, or by ascertaining in any way the bulk, value, or quantity of water to be used.¹ In a partition of land lying on each side of a watercourse between tenants in common, by assigning the land on either side to each respectively, the dividing line between the two tracts will be the thread of the stream.² A partition of a dam and the water-power thereby formed will not be made exclusive of the mill and the mill-site to which they are appurtenant.³ An ancient partition into proportionate parts of a water privilege, originally owned by one proprietor, but for a long series of years occupied by different persons in severalty, and transferred from time to time between themselves by deed, . . . levy, or descent, will be presumed, as it has been used, excepting as to what has been disposed of by common consent.⁴

§ 316. In a partition one part of the common premises may be assigned to a party charged with an easement for the benefit of another party, to which another portion was assigned by metes and bounds,⁵ as of flowage as the water had been wont to flow back before partition.⁶ In a partition of a water-power provision may be made for keeping the various portions of the dam, the water-gates, and the flume in repair, by making it a charge upon the land including them, or by a compensation to be paid by one party to another therefor.⁷ Water, however, conducted in ditches for mining purposes and owned by tenants in common, cannot, from the nature of the water service to be performed, be mechanically partitioned, a distribution of the proceeds after a sale being the only partition practicable to permanently end the disputes of such tenants in common.⁸ Equity

¹ *Hanson v. Willard*, 12 Maine, 142; *Smith v. Smith*, 10 Paige, 470; *Morrill v. Morrill*, 5 N. H. 134; *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398. See *Kane v. Parker*, 4 Wis. 123, 131.

² *King v. King*, 7 Mass. 496.

³ *Miller v. Miller*, 13 Pick. 237.

⁴ *Munroe v. Gates*, 48 Maine, 463.

⁵ *Smith v. Smith*, 10 Paige, 470, 479.

⁶ *Hills v. Dey*, 14 Wend. 204.

⁷ *Smith v. Smith*, 10 Paige, 470; *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398.

⁸ *McGillivray v. Evans*, 27 Cal. 92; *Lorenz v. Jacobs*, 59 Cal. 262. In the latter case a statement that the parties

will intervene to prevent the removal of a dam and the building a new one higher up the stream by a grantee under a deed of partition of a water privilege, the effect of which will be to deprive a co-grantee under the same indenture who was entitled to "six-tenths of the water appertaining to said divided premises," which was construed to mean six-tenths of the water-power, which had been conveyed, as provided in the deed, by a trench to said co-grantee's mill for forty years during which the grantees shared the expense.¹ Equity will not order a sale, under a statute, if the whole water-power, in connection with each mill property, would not be worth more than the same power equally divided by a proper partition, the one half to be used with each mill, in the hands of different proprietors.²

§ 317. When the privilege is granted of taking water by a pipe of a specified size, it authorizes the taking of all the water which such a pipe would conduct, and it is not an abuse of the right for the grantee to permit the water to flow continuously from the mouth of the pipe, even though it runs to waste.³ When the quantity of water granted is regulated by the size of the pipe through which it is drawn, it is limited to so much water as will run through the pipe without increasing its head by a dam, but if the right is granted to draw water from any and all springs on the grantor's land, "with the right to conduct the same by aqueduct to said premises for all uses and purposes forever," the grantee is entitled to take all the water from the springs which is in good faith required for use on the granted premises, and to make such reasonable arrangements as are really necessary to enable him to use all the water.⁴

as tenants in common held and possessed "a certain water ditch, running from and taking water from" a creek and "conducting the water of said creek" to a certain point "for mining and other useful purposes," was held to sufficiently allege that the property can be partitioned only by a sale and distribution.

¹ *Matteson v. Wilbur*, 11 R. I. 545.

² *Smith v. Smith*, 10 Paige, 470.

³ *Bissell v. Grant*, 35 Conn. 288.
See *Paschall v. Passmore*, 15 Penn. St. 295.

⁴ *Stevenson v. Wiggin*, 56 N. H. 308; *Walker v. Stewart*, 18 Law Rep. 396.

Where in a deed of land with "one hundred and fifty inches of water for propelling machinery," to be furnished by the grantor on the premises conveyed in a flume or race and to be taken by the grantee "at the side thereof," at an opening or openings between the bottom and top of the same, it was provided that no more water be taken at said opening or openings than would be discharged at a point as low as the surface of the river "at said premises by an aperture of one hundred and fifty square inches," the deed was held to convey only as much water as would naturally flow through an opening of one hundred and fifty square inches at the side of the main race or flume as low as the surface of the river.¹ The use of an easement is confined to the purposes for which it was granted; and a right reserved in a deed of one lot to draw water from a well thereon for the family occupying another lot confers the right to draw water for the ordinary purposes of a family, but not for an additional use, such as a bakery.²

§ 318. Grants of the right to use water are to be so construed as to substantially secure the rights which appear to have been contemplated by the parties, and the literal reading of the conveyance will not be followed if a more liberal construction does not impair the rights of the other party.³ If the grant of a water-power leaves it doubtful whether the kind of mill mentioned indicates the quantity of water and measures the extent of the power intended to be conveyed, or limits the use to a particular kind of mill, the former construction will be favored, because it is most favorable to the grantee without being more onerous to the grantor.⁴

¹ *Blanchard v. Doering*, 21 Wis. 477; 23 Wis. 200; *Norris v. Showerman*, Walker Ch. 206; 2 Dougl. (Mich.) 16.

² *Noyes v. Hemphill*, 58 N. H. 536; 27 Alb. L. Journ. 157; *French v. Marstin*, 24 N. H. 440.

³ *Atlanta Mills v. Mason*, 120 Mass. 244; *Merrill v. Calkins*, 74 N. Y. 1; *Esty v. Baker*, 50 Maine, 325; *Salado College v. Davis*, 47 Texas, 121; *Hath-*

away v. Mitchell, 34 Mich. 164; *Doan v. Metcalf*, 46 Iowa, 120. If the owner of the whole length of a river grants "a certain part" of it, he conveys a part of the whole length. *Bullen v. Runnels*, 2 N. H. 255.

⁴ *Ashley v. Pease*, 18 Pick. 275; *Pratt v. Lamson*, 2 Allen, 281; *Johnston v. Hyde*, 33 N. J. Eq. 632; *Covel v. Hart*, 56 Maine, 518; *Hines v. Robinson*, 57 Maine, 324; *Kaler v.*

When it appears that the granted privilege is a given quantity of power, not limited to a specific purpose, it may be apportioned to any purpose whatever, and by any person to whom it may be assigned or transferred.¹ If, under a grant of an unlimited right to flow, at the first settlement of the country, the grantee flows his land to a certain extent for a great length of time, this will be considered his construction of the grant, and will prevent him from raising his dam.²

§ 318*a*. When a water easement is granted in general or indefinite terms, rendering the construction doubtful, contemporaneous acts of the parties, giving a practical construction to the grant, will be deemed to express their intention,³ as a right to erect a dam within certain limits is fixed by building it within those limits by mutual consent.⁴ A grant of a right to build a dam and flow the water "as high as will answer, and not injure or obstruct the water-wheels" of an upper mill, is determined by what the parties did immediately after the grant, under a mutual agreement, defining the site and height of the dam.⁵ And when the parties have once exercised the right, the grantee cannot change the manner of its enjoyment at his pleasure.⁶ Thus, after pipes have been laid and water through them used for many years under a grant defining neither size or quantity, larger pipes cannot be laid and more water taken,⁷ and pipes of the same size,

Beaman, 49 Maine, 207; Garland *v.* 207; Allen *v.* Bates, 6 Pick. 460; Hodson, 46 Maine, 511; Miller *v.* Dryden *v.* Jepherson, 18 Pick. 385; Lapham, 46 Vt. 525; 44 Vt. 416; Stone *v.* Clark, 1 Met. 378; Bannon *v.* Dewey *v.* Williams, 40 N. H. 222; Angier, 2 Allen, 128; Farrar *v.* Cooper, 34 Maine, 394; Davidson *v.* Fowler, 1 Leavitt *v.* Towle, 8 N. H. 96; Salado College *v.* Davis, 47 Texas, 131.

¹ Ibid.; Tourtellot *v.* Phelps, 4 Gray, 374; Casler *v.* Shipman, 35 N. Y. 533; Comstock *v.* Johnson, 46 N. Y. 615; Drummond *v.* Hinckley, 30 Maine, 433; Deshon *v.* Porter, 38 Maine, 289; Dow *v.* Edes, 58 N. H. 193; Hathaway *v.* Mitchell, 34 Mich. 164.

² 2 Swift's Sys. 86; Barret *v.* Hosmer, 1 Root, 271.

³ Makepeace *v.* Bancroft, 12 Mass. 469; Davis *v.* Rainsford, 17 Mass.

207; Allen *v.* Bates, 6 Pick. 460; Dryden *v.* Jepherson, 18 Pick. 385; Stone *v.* Clark, 1 Met. 378; Bannon *v.* Angier, 2 Allen, 128; Farrar *v.* Cooper, 34 Maine, 394; Davidson *v.* Fowler, 1 Root, 358.

⁴ Boynton *v.* Rees, 8 Pick. 329.

⁵ Dryden *v.* Jepherson, 18 Pick. 385.

⁶ Jennison *v.* Walker, 11 Gray, 423; Evangelical Home *v.* Buffalo Hydraulic Co., 64 N. Y. 561; Jones *v.* Percival, 5 Pick. 485; Choate *v.* Burnham, 7 Pick. 274; Wynkoop *v.* Burger, 12 John. 222; Johnson *v.* Jaqui, 27 N. J. Eq. 552.

⁷ Onthank *v.* Lake Shore Railroad Co., 71 N. Y. 194.

if relaid, must be sunk in the same place.¹ If a boundary is variable, as a pond which is raised more or less at various times by a dam, parol evidence is admissible to show what line was actually agreed on at the time of the conveyance.² A boundary line in a deed to run so as to include the "whole of a mill-pond which may be raised by a dam," determines the land boundary and not the height to which the pond may be raised.³

§ 319. A conveyance of water rights should be construed in the light of preliminary agreements and circumstances, rendering the purpose of the parties plain.⁴ A general grant of water easements will be construed in connection with any express stipulations that may be contained in the demise in view of the character of the right granted.⁵ In *Prentiss v. Wood*,⁶ where a grant of a water privilege by A. and B. to C. provided that "the said C. is to have the right to build a dam across said river as high as he shall need, by his being responsible for all damages that may be done by flowing in consequence of said dam, excepting, as is hereinafter provided, to wit, the said C. shall have the right to flow the land of said A. and B. without paying damage therefor, so far and so high as he can do so without setting the water back upon the wheel of their grist-mill, so as in any manner to obstruct said wheel or injure the privilege of said A. and B.," it was held that the natural construction was that C. had the right to build the dam as high as he should need, paying all damages, with the proviso that he was not to pay A. and B. any damages unless it flowed the water back upon their wheel, the clause as to the back-flow upon their wheel being a limitation of the right to flow without paying damages, not a

¹ *Woodcock v. Estey*, 43 Vt. 515; *Jennison v. Walker*, 11 Gray, 423.

² *Waterman v. Johnson*, 13 Pick. 261.

³ *Hull v. Fuller*, 4 Vt. 199.

⁴ *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249. See *Winkley v. Salisbury Manuf. Co.*, 14 Gray, 443.

⁵ *Watts v. Kinney*, 6 Hill, 82;

Phelps v. Tourtellot, 9 Gray, 102;

Kennedy v. Scovil, 12 Conn. 317. See

Hatch v. Dwight, 17 Mass. 289;

Randall v. Silverthorn, 4 Penn. St. 173.

⁶ 118 Mass. 589.

limitation of the right granted to build a dam as high as C. should need. In the construction of a grant and reservation, the obvious intention of the parties will govern.¹ In *Chadwick v. Marsden*,² a reservation in a lease of "the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised, in and through the sewers and watercourses made or to be made within, through, or under the said premises," was held to "mean water naturally falling or arising on, or elsewhere, and coming to, the contiguous land, and to such matters as are the product of the ordinary use of land for habitation, such as night soil and sewage," and not to extend to the "refuse, however offensive," of certain tan-pits located on the adjoining land.

§ 320. When the easement is of a certain quantity of water, the owner is not bound to use it in a particular manner, though the purpose for which it is used is mentioned in the grant. He may use the water in a different manner or at a different place, or increase the capacity of the machinery which is propelled by it, without affecting his right, if the quantity used is not increased and the change does not prejudice the rights of others.³ This rule applies both to reservations and grants.⁴ If the use of water is granted for a certain purpose, with a prohibition against certain other specified uses, the grantee may use it for any purpose not prohibited.⁵ It is, however, within the power of the grantor to limit the use of the water granted to a

¹ *Moore v. Fletcher*, 16 Maine, 63; *Provost v. Calder*, 2 Wend. 517; *Marshall v. Niles*, 8 Conn. 369; *Nicodemus v. Nicodemus*, 41 Md. 529.

² L. R. 2 Ex. 285.

³ *Luttrell's case*, 4 Co. 86; *Hale v. Oldroyd*, 14 M. & W. 789; *Watts v. Kelson*, L. R. 6 Ch. 166; *Casler v. Shipman*, 35 N. Y. 533; *Cromwell v. Selden*, 3 Comst. 253; *Merrill v. Calkins*, 74 N. Y. 1; *Cress v. Varney*, 17 Penn. St. 496; *Bigelow v. Battel*, 15 Mass. 313; *Adams v. Warner*, 23

Vt. 395; *Rogers v. Bancroft*, 20 Vt. 250; *Rood v. Johnson*, 26 Vt. 64; *Davis v. Muncey*, 38 Maine, 90; *Deshon v. Porter*, 38 Maine, 293; *Covil v. Hart*, 56 Maine, 518; *Blake v. Madigan*, 65 Maine, 522; *Doan v. Metcalf*, 46 Iowa, 120. See *Richards v. Koenig*, 24 Wis. 360.

⁴ *Ibid.*; *Miller v. Lapham*, 44 Vt. 416; 46 Vt. 525.

⁵ *Iszard v. Mays Landing Water-Power Co.*, 31 N. J. Eq. 511; 34 N. J. Eq. 556.

specific purpose, and not merely in quantity, and, in determining whether such was the intention, the situation and circumstances of the parties may be taken into consideration.¹ If the grant be of water sufficient for a given purpose, and this is made by the owner of the whole stream, the grantor and his assigns are precluded from diminishing or defeating in any way what is thus conveyed.² To a suit for the violation of a covenant respecting the joint use of water, it is no answer to say that the alterations would not be injurious, or to prove even that they are beneficial to the complainants.³ Thus, a defendant has been held liable for increasing the size of a flume, although it was more advantageous to the plaintiff.⁴ Where an indenture, made in 1841, provided that "in case there is not at any time a full supply of water for the simultaneous operations of the works connected with the dam, the grist-mill shall draw its requisite quantity of water exclusive of all other works," it was held that the right secured to the grist-mill was not merely a right to use the water exclusively in the manner and for the time it was then accustomed to be used, but a right to use the water in *quantity* as then used, and for such length of time during the season of scarcity as the custom and business of the mill might require; and that, if the work done in six hours by the wheel substituted for the one in the mill when the covenant was made, was as much as that done by the latter in twenty-four hours, and with the use of less water, there appeared to be no breach of covenant, if the business was of the same character as was done in

¹ Strong v. Benedict, 5 Conn. 210; De Witt v. Harvey, 4 Gray, 486; Sibley v. Hoar, 4 Gray, 222; Tourtellot v. Phelps, 4 Gray, 370, 374; Garland v. Hodson, 46 Maine, 511; Ashley v. Pease, 18 Pick. 268; Peck v. Conway, 119 Mass. 546; Borst v. Empie, 1 Selden, 33; Shed v. Leslie, 22 Vt. 498; McKelway v. Seymour, 29 N. J. L. 321; Washabaugh v. Oyster, 18 Penn. St. 497.

² Jordan v. Mayo, 41 Maine, 552; Samuels v. Blanchard, 25 Wis. 329.

³ Dickerson v. Grand Junction Canal Co., 15 Beav. 260; Hulme v. Shreve, 3 Green Ch. 116; Johnston v. Hyde, 32 N. J. Eq. 446; Dewey v. Bellows, 9 N. H. 282; Jewett v. Whitney, 43 Maine, 242; Howe Scale Co. v. Terry, 47 Vt. 109; Carver v. Miller, 4 Mass. 558.

⁴ Dewey v. Bellows, 9 N. H. 282.

1841.¹ The grantee of the right to use the surplus water not required by a certain mill cannot interfere with the necessary supply of water for such mill, but may maintain an action against the mill-owner, if he prevents the passage of the water when there is no deficiency.²

§ 321. Water rights are, in general, interests connected with land, and, as such, are within the statute of frauds. The right to overflow another's land by a mill-dam,³ by the drippings from a roof,⁴ or to erect a mill on another's land,⁵ is an interest in land which cannot pass by parol. A parol agreement that a person may abut and erect a dam upon the land of another, not for a temporary, but for a permanent purpose, as the creation of mills or hydraulic works, is void within the statute of frauds.⁶ The right to enter upon another's land for the purpose of repairing a dam and embankment necessary to the working of a mill, and erected by the consent of the owner of the land, can only be acquired by deed or prescription.⁷ So, a ferry franchise is real estate, and can only be transferred by deed.⁸ A verbal license to take water from a well on another's land gives the licensee no such interest in the well as will entitle him to recover damages for the pollution of the water therein.⁹

§ 322. While an easement can only be created by deed,¹⁰ yet a license, which is a permission to do some act or series of acts on the licensor's land, without having any permanent

¹ *Howe Scale Co. v. Terry*, 47 Vt. 109, 123; *Loverin v. Walker*, 44 N. H. 489. See *Davis v. Muncey*, 38 Maine, 90.

² *Sumner v. Foster*, 7 Pick. 32.

³ *Woodward v. Seely*, 11 Ill. 157; *Cook v. Pridgen*, 45 Ga. 331; *Harris v. Miller, Meigs* (Tenn.) 158; *Carter v. Harlan*, 6 Md. 20; *French v. Owen*, 2 Wis. 250; *Clute v. Carr*, 20 Wis. 531; *Thompson v. Gregory*, 4 Johns. 81; *Woodward v. Seely*, 11 Ill. 157; *Harris v. Miller, Meigs* (Tenn.) 158.

⁴ *Tanner v. Volentine*, 75 Ill. 624.

⁵ *Trammell v. Trammell*, 11 Rich. (S. C.) 471; *Bostwick v. Leach*, 3 Day, 476.

⁶ *Mumford v. Whitney*, 15 Wend. 380; *Moulton v. Faught*, 41 Maine, 298; *Phillips v. Thompson*, 1 John. Ch. 131.

⁷ *Cook v. Stearns*, 11 Mass. 533; *Jackson v. Litch*, 62 Penn. St. 451.

⁸ *Dundy v. Chambers*, 23 Ill. 360.

⁹ *Ottawa Gaslight Co. v. Thompson*, 39 Ill. 598; *Clark v. Close*, 43 Iowa, 92.

¹⁰ *Ante*, § 300.

interest in it, may be given verbally as well as by writing.¹ A parol grant of the privilege of floating timber down a private stream, not involving the occupation of the land, is a mere license and not within the statute of frauds.² An agreement between the owner of an artificial watercourse and a railroad company, whereby the former permits the latter to divert the water into a new channel on its own land, in consideration that the company will open the old channel and restore the water thereto whenever requested, is not a contract for an interest in land within the statute.³ An agreement to accept a certain annual compensation for damages occasioned by flowing land by a mill-dam,⁴ or an agreement not to demand damages for flowing one's land, if the other party will erect a mill and dam,⁵ does not create such a right, interest, or easement in land as requires a writing. A parol agreement to flow a neighbor's land, for a stipulated annual compensation, during an indefinite period, by means of a dam on one's own premises, is within the statute of frauds; but if that statute permits leases for a year to be created by parol, such an agreement may be treated as a valid lease from year to year, until terminated by notice.⁶ If the owner of land assists as a laborer in building and repairing a dam which he knows will flow his land, says that the mill will benefit the neighborhood and urges other laborers to make the dam tight, these facts will not constitute either a valid license or estop him from claiming damages for the flowing of his land by the dam.⁷ Upon such facts, it is for the jury to say whether a license was in fact given.⁸ If acts are performed upon another's estate under

¹ *Morrill v. Mackman*, 24 Mich. 279; *Whitmarsh v. Walker*, 1 Met. 313; *Taylor v. Waters*, 7 Taunt. 374; *Fentiman v. Smith*, 4 East, 107; *Cook v. C. B. & Q. R. Co.*, 40 Iowa, 451.

² *Rhodes v. Otis*, 33 Ala. 578.

³ *Hamilton Hydraulic Co. v. Cincinnati Railroad Co.*, 29 Ohio St. 341.

⁴ *Short v. Woodward*, 13 Gray, 86.

⁵ *Smith v. Goulding*, 6 Cush. 154; *Clement v. Durgin*, 5 Greenl. 9. See

Seidensparger v. Spear, 17 Maine, 123.

⁶ *Morrill v. Mackman*, 24 Mich. 279.

⁷ *Batchelder v. Sanborn*, 24 N. H. 474; *Watkins v. Peck*, 13 N. H. 360.

⁸ *Johnson v. Lewis*, 13 Conn. 303; *Swartz v. Swartz*, 4 Penn. St. 353; *Corning v. Gould*, 16 Wend. 531; *Christmas v. Oliver*, 10 Q. B. 181; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311.

licenses asked and obtained from time to time, or without causing any damage,¹ long enjoyment cannot be as of right so as to give rise to a custom or prescription.² The right acquired by a license or agreement, whether oral or written, such as the right to flow land by a dam, differs from that acquired by prescription in that the privilege acquired by the grant need not be uniformly exercised to its full extent.³ But an *éasement*, whether acquired by grant or by prescription, may be extinguished, abandoned, or modified by a parol license granted by the owner of the dominant tenement and executed by the owner of the servient tenement.⁴ Thus, evidence is admissible to prove a verbal agreement, which has been carried into effect, whereby a previously executed conveyance of a right to a watercourse through the granted premises, by courses and distances, was modified so as to change the course of the water for the mutual accommodation of the parties.⁵

§ 323. When a parol license has been executed, in whole or in part, it is a justification for the acts done under it prior to its revocation or the completion of the work.⁶ Where a land-owner verbally authorized his neighbor to construct and use perpetually a ditch over the former's estate for the purpose of draining the latter's land, such license was held to be irrevocable by the grantee of the licensor, after the construction and continued use of the drain, although unforeseen

¹ *Hathorn v. Stinson*, 12 Maine, 183; *Nelson v. Butterfield*, 21 Maine, 220.

² *Mills v. Colchester*, L. R. 2 C. P. 476; *Cocker v. Cowper*, 1 Cr., M. & R. 418; *Corning v. Troy Iron Factory*, 34 Barb. 485; 39 Barb. 311; 40 N. Y. 191; *Tinkham v. Arnold*, 3 Greenl. 120; *Stevens v. Morse*, 5 Greenl. 26.

³ *Lacy v. Arnett*, 33 Penn. St. 169.

⁴ *Morse v. Copeland*, 2 Gray, 302, 304; *Dyer v. Sandford*, 9 Met. 395; *Curtis v. Noonan*, 10 Allen, 406;

Winter v. Brockwell, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; 5 Moore & P. 712.

⁵ *Le Fevre v. Le Fevre*, 4 S. & R. 241.

⁶ *Selden v. Delaware Canal Co.*, 29 N. Y. 634; *Miller v. Auburn Railroad Co.*, 6 Hill, 61; *Carter v. Page*, 4 Ired. 424 8; *Baker v. Chicago Railroad Co.*, 57 Mo. 265; *Blaisdell v. Portsmouth Railroad*, 51 N. H. 483; *Sterling v. Warden*, Id. 217; *Marston v. Gale*, 24 N. H. 176; *Addison v. Hack*, 2 Gill, 221.

injuries resulted therefrom.¹ If a licensee, under authority so conferred for a consideration, makes large investments for the enjoyment of a permanent easement, the licensor is estopped to revoke the license, unless the licensee can be placed in *statu quo*,² and equity will decree specific performance, as in other cases of part performance,³ especially if adequate compensation in damages cannot be obtained.⁴ The more recent decisions and the weight of authority are to the effect that, both at law and in equity, the doctrine that an executed license is irrevocable is confined to those licenses under which, when executed, it cannot be claimed that any estate or interest in lands passes,⁵ and to licenses which are given upon a valuable consideration.⁶ In case of laches,⁷ or express acquiescence,⁸ equity will not interfere by injunction to enforce the rights acquired under a parol license, but will leave the parties to first try the question at law. A license to flow the water from the licensee's land through the ditch of the licensor affords no

¹ *Hodgson v. Jeffries*, 52 Ind. 334; *Cook v. C. B. & Q. R. Co.*, 40 Iowa, 451, 455.

² *Lane v. Miller*, 27 Ind. 534; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; 19 N. J. Eq. 142; *Hall v. Chaffee*, 13 Vt. 150; *Foot v. New Haven Co.*, 23 Conn. 214; *Morse v. Copeland*, 2 Gray, 302; *Blanchard v. Baker*, 8 Greenl. 253; *Androscoggin Bridge v. Bragg*, 11 N. H. 102; *Hall v. Chaffee*, 13 Vt. 150; *Rerick v. Kern*, 14 S. & R. 267; *Mumford v. Whitney*, 15 Wend. 380; *Addison v. Hack*, 2 Gill, 221; *Van Ohlen v. Van Ohlen*, 56 Ill. 528; *Sheffield v. Collier*, 3 Kelly (Ga.) 82.

³ *Cook v. Pridgen*, 45 Ga. 331; *Winham v. McGuire*, 51 Ga. 578; *Wynn v. Garland*, 19 Ark. 23; *Le Fevre v. Le Fevre*, 4 S. & R. 241; *McKellip v. McIlhenny*, 4 Watts, 317; *Lee v. McLeod*, 12 Nev. 280; *Gooch v. Sullivan*, 13 Nev. 78.

⁴ *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, Id. 367.

⁵ *Clute v. Carr*, 20 Wis. 531; *Hazel-*

ton v. Putnam, 3 Pin. (Wis.) 107; 5 Chand. 117; *French v. Owen*, 2 Wis. 250; *Fryer v. Warne*, 29 Wis. 511; *Cook v. Stearns*, 11 Mass. 533; *Houston v. Laffee*, 46 N. H. 505; *Batchelder v. Hibbard*, 58 N. H. 269; *Van Ohlen v. Van Ohlen*, 56 Ill. 528. See, however, *Wiseman v. Lucresinger*, 84 N. Y. 31. The rule, as sometimes stated, that an executed license cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement; but to licenses, which, if given by deed, would extinguish or modify an easement. *Morse v. Copeland*, 2 Gray, 302.

⁶ *Babcock v. Utter*, 1 Abb. Dec. 27; 1 Keyes, 115, 397.

⁷ *Weller v. Smeaton*, 1 Bro. Ch. 572; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 517; *Anon.* 2 Eq. Cas. Apr. 523 Pl. 3; *Williams v. Jersey*, 1 Cr. & Ph. Ch. 92; *Jones v. Royal Canal Co.*, 2 Molloy, 319; *Hulme v. Shreve*, 3 Green. Ch. 116.

⁸ *Cobb v. Smith*, 16 Wis. 661; 23 Wis. 261.

justification for afterwards causing an increase in the quantity of the water so flowed.¹ A parol license to enlarge a canal justifies an increase in its depth as well as its width, and, while in force, relieves the licensee from any consequences which may naturally flow from such enlargement.² Such a license authorizing the plaintiff or his grantor to build a dam on another's land, in order to raise a reservoir of water for the use of his mill, confers no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it.³ A verbal license to erect a bridge, or aqueduct, or a dam and fish traps on another's premises is not a license to renew them as often as they fall to decay or are washed away, but is revocable at any time before they are renewed,⁴ and, if the condition, upon which a license to build a dam is given, is that the licensor shall not be injured thereby, and the work is so imperfectly executed that the water sets back upon his wheels, the licensor is not bound by his consent, and the licensee is liable for the injury caused to him.⁵ After the lessee has enjoyed the right secured by a verbal lease, such as a right of fishery, he is liable for the stipulated rent, notwithstanding the statute of frauds.⁶ By a common agreement of all parties interested, though merely verbal, a new channel may doubtless be made for a stream, the water turned into it, and the old watercourse abandoned or obliterated, and the new channel be thereafter the only channel.⁷ A contract by which one party is to build a dam and the other to pay therefor in certain instalments, which was signed only by the first party, is binding if it appears that the other party paid his instalments as required by the agreement and both acted upon it as binding.⁸

¹ *Carter v. Page*, 8 Ired. 190.

² *Selden v. Delaware Canal Co.*, 29 N. Y. 634; 24 Barb. 362.

³ *Pitman v. Poor*, 38 Maine, 237; *Moulton v. Faught*, 41 Maine, 298.

⁴ *Wingard v. Tift*, 24 Ga. 179; *Hall v. Boyd*, 14 Ga. 1; *Farmer v. McDonald*, 59 Ga. 509; *Allen v. Fiske*, 42 Vt. 462; *Carleton v. Redington*, 21 N. H. 291; *Coles v. Kidder*, 24 N. H.

364; *Hepburn v. McDowell*, 17 S. & R. 383.

⁵ *Brown v. Bowen*, 30 N. Y. 519.

⁶ *Eastham v. Anderson*, 119 Mass. 526.

⁷ *Dunklee v. Wilton Railroad Co.*, 24 N. H. 489, 506; *Wetmore v. White*, 2 Caines, 87; *Pratt v. Lamson*, 2 Allen, 275.

⁸ *Reedy v. Smith*, 42 Cal. 245.

§ 324. A parol license may be revoked so long as it remains unexecuted,¹ although a consideration for it has been paid,¹ and terminates with the death of the licensor.² A license by a riparian proprietor for the building of a bridge on his premises is revocable, and is revoked by a conveyance of the property.³ Where A. and B. agreed by an unsealed writing that A. might cut timber on B.'s land, and that B. might flow A.'s land to a certain extent by a dam, it was held that, although the licenses might have been mutual and given, each in consideration for the other, they were independent, and that either might be revoked without the other.⁴ But where A., at B.'s request, agreed verbally to build his mill at a spot different from that which he had intended, and which was selected by B., and also to give B. possession of a strip of land required to straighten B.'s lines, and to saw B.'s lumber at less than the market rates, and B. agreed, in return, to permit A. to build a tramway across B.'s land, and to throw the waste from the mill into a stream running through B.'s land, it was held that, the contract having been executed by both parties, A.'s license to throw the waste from the mill into the stream was irrevocable.⁵ Upon the revocation of a license to erect a dam upon another's land, and tender of the expenses thereof, it is as much the duty of the licensor as of the licensee to remove the dam.⁶ A parol license cannot be assigned by the licensee,⁷ and is presumed to be inoperative if not acted upon within a reasonable time;⁸ but an abandonment will not be presumed where the enjoyment of the license is interrupted by a providential cause, without laches or fault on the part of

¹ *Beidelman v. Foulk*, 5 Watts, 308; *Dark v. Johnston*, 55 Penn. St. 104; *Owen v. Field*, 12 Allen, 457; *Hewlins v. Shippam*, 5 B. & C. 222; *Bryant v. Whistler*, 8 B. & C. 288.

² *Bridges v. Purcell*, 1 Dev. & Bat. 492.

³ *Jackson v. Babcock*, 4 John. 418; *Drake v. Wells*, 11 Allen, 141; *Dark v. Johnston*, 55 Penn. St. 104, 171; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Clark v. Close*, 43 Iowa, 92.

⁴ *Dodge v. McClintock*, 47 N. H. 383; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248.

⁵ *Thompson v. McElarney*, 82 Penn. St. 174; *Lacy v. Arnett*, 33 Penn. St. 169.

⁶ *Woodbury v. Parshley*, 7 N. H. 237.

⁷ *Ruggles v. Lesure*, 24 Pick. 187; *Carleton v. Redington*, 21 N. H. 291.

⁸ *Hill v. Lord*, 48 Maine, 83; *Hoit v. Stratton Mills*, 54 N. H. 109.

the licensee.¹ If a license to butt a dam on the opposite shore, until the opposite owner should wish the privilege for his own use, is revoked, the licensee's right to the head of water thus raised and appropriated remains unimpaired.²

§ 325. The right of a riparian proprietor to the use of a stream is so valuable that misrepresentations as to the benefits or disadvantages arising therefrom may afford a cause of action for fraud or deceit.³ If the vendor of land which the vendee wishes, with the knowledge of the vendor, to purchase for a stock-ranch, represents that the land sold was upon a certain creek, when, in fact, the land was not supplied with water from that creek or any other source, and was worthless as a stock-ranch, the sale may be set aside at suit of the vendee, although the vendor made the statement in ignorance of the truth, and refused to enter such description in the warranty clause of the deed.⁴ So, if the vendor of a river plantation makes positive representations as to its comparative safety from overflow, which are inducements to the vendee to purchase, the latter may recoup, to the extent of his injury, in a suit in chancery by the vendor to enforce security for the purchase-money;⁵ and if the land is diminished in value by the overflow, and the representations are false and fraudulent, a court of equity will rescind the contract.⁶ If a positive declaration is made that a sluiceway connected with a mill is firmly laid upon sand rock which is from four to five feet below the bed of the river at that point, the vendee may rely upon the representations, and may maintain an action for deceit against the vendor if such representations are false and fraudulent.⁷ So,

¹ *Southwestern Railroad Co. v. Mitchell* (Ga.), 27 Alb. L. Journ. 116.

² *Blanchard v. Baker*, 8 Greenl. 253, which suggested that the right might still be "enjoyed by a diagonal or wing dam."

³ *Farris v. Ware*, 60 Maine, 482; *Gilpin v. Smith*, 11 S. & M. 109; *Sargent v. Gutterson*, 13 N. H. 467; *Winston v. Gwathmey*, 8 B. Mon. 19, 23;

White v. Hardin, 5 Dana, 154; *Long v. Weller*, 29 Gratt. 347.

⁴ *Pendervis v. Gray*, 41 Texas, 326.

⁵ *Estell v. Myers*, 54 Miss. 174; *Reynolds v. Cox*, 11 Ind. 262; *Durrett v. Simpson*, 3 Mon. 517.

⁶ *Alexander v. Beresford*, 27 Miss. 747.

⁷ *Faribault v. Sater*, 13 Minn. 223.

fraudulent representations, as to the extent of the right to the use of a sewer, are cause for an action for fraud and deceit.¹

§ 326. Promissory representations, or expressions of opinion that a dam will in the future continue to furnish the full amount of power conveyed, or that "the stream will furnish water to run the mill day and night eight months in the year,"² are not fraudulent, though proved to be erroneous;³ nor are representations that the dam supplied "about three times as much" power as was conveyed, where the dam furnishes the vendee the full amount conveyed to him.⁴ Where a navigation company laid out a town and sold the lots, the purchasers expecting that they would open the navigation to it, and the lots were rendered worthless because the funds of the company were insufficient, the vendees were held not entitled to relief in equity, upon the ground that the vendors had made no fraudulent concealment of their means.⁵ If a deed conveys the right to flow so much of the grantor's land as would be flowed by raising the water of a stream by a dam to a certain height, it will not be cancelled upon a bill by the grantor, alleging that the deed was procured by the grantee's false representations as to the quantity of land that would be flowed by thus raising the water, if it appears that the prospective flowage could be ascertained by personal inspection; that neither party possessed any means of information not thus obtainable; that the grantor's agent inspected the land for this purpose before the sale, and the grantee did nothing tending to mislead the agent.⁶ An affirmation that land which is, in fact, imperfectly watered is "uncommonly rich water meadow-land" will not render the contract voidable in equity by the purchaser, although the court might, on that account, be disinclined to enforce specific performance at the suit of the vendor.⁷ And if a spring, which was rep-

¹ *Whitney v. Allaire*, 1 N. Y. 305;
Green v. Collins, 86 N. Y. 246, 253.

² *Morrison v. Koch*, 32 Wis. 254;
Banta v. Savage, 12 Nev. 151.

³ *Clark v. Ralls*, 50 Iowa, 275.

⁴ *Morrison v. Koch*, 32 Wis. 254;
Wells v. Day, 124 Mass. 38.

⁵ *Turner v. Cape Fear Navigation Co.*, 2 Dev. Eq. 236.

⁶ *Sanford v. Nyman*, 23 Mich. 326;
Wright v. Gully, 28 Ind. 475.

⁷ *Scott v. Hare*, 1 Sim. 13.

resented to be upon the tract of land sold, could not, from its location and value, have formed a decided inducement to the purchase, there is no ground for rescission, if, in fact, it is found to be without the purchase.¹ Upon the sale of "eighty acres of land, be the same more or less," including a mill-site, if it is evident that such site was the main object of the purchaser, a deficiency of twenty acres in the land sold will not, in the absence of fraud, justify a rescission of the contract.²

§ 327. Damages for the breach of a covenant against incumbrances, when the incumbrance is of a permanent character and impairs the value of the premises, such as an easement of a canal company to pass and repass along their canal upon the premises, upon which it abutted, for the purpose of cleaning and repairing it, will be measured by the diminished value of the premises.³ Damages for failure to keep a dam in repair so as to furnish the necessary supply of water, as agreed in a lease of a saw-mill, the lessee to have a right to repair at the lessor's expense, is the difference between the rental value of the mill in its then condition and in the stipulated condition, or the cost of repairs; and profits that would have been made if kept in the latter condition, or for deterioration of machinery, etc., are too remote.⁴

§ 328. Mill-owners on either side of a stream are jointly liable to keep the dam between them in repair,⁵ each being bound to keep his own flume in order, and one will not be liable, while using ordinary diligence, to the other, for damage accidentally caused in making the repairs.⁶ The grantee of an ancient mill, the water from which has passed off from time immemorial, through a raceway, which was an artificial channel, through land of another, has a right to enter on such land and clear out any obstructions in the ordinary

¹ *Winston v. Gwathmey*, 8 B. Mon. 19, 23; *Jasper v. Hamilton*, 3 Dana, 280. *Fort v. Orndoff*, 7 Heisk. 167; *ante*, § 211 b.

² *Pollock v. Wilson*, 3 Dana, 25.

⁵ *Runnels v. Bullen*, 2 N. H. 532.

³ *Mitchell v. Stanley*, 44 Conn. 312.

⁶ *Boynton v. Rees*, 9 Pick. 527.

⁴ *Winne v. Kelley*, 34 Iowa, 339;

manner, doing no unnecessary damage,¹ and to make repairs² and improvements, etc., necessary to its full enjoyment.³ A right to enter to cleanse a pool and repair a dam is incident to a grant to flow back water upon the grantor's premises,⁴ and to take earth and stones from the bottom of the pond for that purpose.⁵ A person with a right to use a well and pump on another's land, each being bound to pay for repairs proportionately, cannot maintain an action against the latter before a request and a refusal to repair.⁶ Under the general rule that a lessor, in the absence of an express agreement, is not bound to make any repairs,⁷ leases of a farm with "water privileges from the mill-pond for turning a wheel to drive a saddle-tree manufactory,"⁸ and of "so much of the surplus water of a canal" as might be necessary to propel a mill of a certain kind,⁹ have been held not to bind the former lessor to keep the mill-dam in repair, and sufficient water in the mill-pond to carry on the factory, or to prevent the latter from abandoning the navigation of the canal, and suffering it to go to decay. A general covenant in a lease of a mill property and land "to keep the mill in good repair," while it may embrace an obligation to keep the tail-race in as good repair as at the date of the agreement to lease, will not relieve the lessee of an obligation to clear the race of such deposits as result from the ordinary use of the mill.¹⁰ A bond to build and keep a bridge in repair for

¹ Prescott v. White, 21 Pick. 341; White v. Chapin, 12 Allen, 516, 521; Roberts v. Roberts, 55 N. Y. 275.

² Daniel v. Chaffin, 28 Iowa, 327.

³ Beals v. Stewart, 6 Lans. 408. Pico v. Colimas, 32 Cal. 578, while admitting the general principle that a person, enjoying an easement in the land of another, may enter thereon to keep it in repair, declared that a water commissioner, under the statute to regulate watercourses, etc., had no authority as such to repair a watercourse, or to make an entry to remove an obstruction.

⁴ Frailey v. Waters, 7 Penn. St. 221.

⁵ Miller v. Scolfield, 12 Conn. 335.

⁶ Doane v. Badger, 12 Mass. 65; Calvert v. Aldrich, 99 Mass. 74, 76.

⁷ Pomfret v. Ricroft, 1 Wms. Saund. 321 n.; Colebeck v. Girdlers Co., 1 Q. B. D. 234. Sheets v. Selden, 7 Wall. 416, decided that a lessee, under a water-power lease, providing for an abatement of rent for every failure of water, cannot, having forfeited the estate by non-payment of rent after due proceedings had, set up a claim for repairs to the water-channel made necessary by the landlord's gross negligence.

⁸ Morse v. Maddox, 17 Mo. 539.

⁹ Trustees v. Brett, 25 Ind. 409.

¹⁰ Middlekauff v. Smith, 1 Md. 329. See Bird v. Elwes, L. R. 3 Ex. 225.

four years binds the obligor to rebuild, even if it is washed away by an extraordinary flood, in default of which the damages will be the cost of rebuilding, with the premium requisite to insure it against the perils named in the bond for the time remaining.¹ The owner of a water-mill benefited by a reservoir higher up the stream, who promises to pay his proportionate share of the cost of necessary repairs, if made, is liable on their completion, in an ordinary action upon an account annexed.²

¹ *Gathwright v. Callaway County*, 10 Mo. 663. *Contra*, *Livingston County v. Graves*, 32 Mo. 479, where the bridge was burned, on the ground that the agreement to repair was merely a means to find out if the builder had properly constructed the bridge.

² *Mullett v. Bemis*, 100 Mass. 92.

CHAPTER XI.

PREScription. — SEVERANCE OF TENEMENTS.

SECTION.

- 329. Prescriptive rights, how acquired.
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- 334. Prescriptive right, how acquired. — The adverse use must be inconsistent with the continuance of the prior right.
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- 342. Prescriptive rights limited by the user.
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- 362. Necessity, not convenience, the ground on which implied grants are upheld.

§ 329. No one can acquire an easement in his own estate.¹ But, in the absence of an express grant of such right from another, an easement in water may arise: first, by prescription; second, upon severance of tenements. With respect to prescriptive rights, it is settled that the owner of land upon the margin of a natural stream may by long user acquire a right to use the water in a manner not justified by his natural rights. The term "prescription" is strictly applicable only to incorporeal hereditaments and not to land;² and, under the ancient rule of the common law, the use of the incorporeal right, in order to support a title by prescription, must have continued immemorially, that is, have had a commencement before the reign of Richard I.³ Inasmuch as such length of user is now difficult of proof in England, and incapable of proof here, it came to be held that the existence of an earlier right may be inferred from evidence of enjoyment during a less period.⁴ It is now generally held that a continued use in a particular manner and without opposition through twenty years, corresponding to the period usually prescribed by statutes of limitations for an entry on lands, is sufficient for the purpose.⁵ Under this rule, the use must have assumed

¹ *Ritger v. Parker*, 8 Cush. 145; *White v. Chapin*, 12 Allen, 516, 518.

² *Wilkinson v. Proud*, 11 M. & W. 33; *Carlyon v. Lovering*, 1 H. & N. 784; *Hall on the Seashore* (2d ed.), 22; *Caldwell v. Copeland*, 37 Penn. St. 427, 431; *Ferris v. Brown*, 3 Barb. 105; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21.

³ 1 Black. Com. 75; 2 Id. 263; Bract. lib. 2, c. 22.

⁴ *Falmouth v. Innys*, Mosely, 87; *Hillary v. Waller*, 12 Ves. 261; *Finch v. Resbridger*, 2 Vern. 390; *Hill v. Smith*, 10 East, 476; *Trotter v. Harris*, 2 Younge & J. 285; *Jackson v. Harvey*, 1 Cr. M. & R. 51; *Saunders v. Newman*, 1 B. & Ald. 258; *Bailey v. Applegard*, 8 Ad. & El. 161; *Hazard v. Robinson*, 3 Mason, 272, 275; *Wallace v. Fletcher*, 30 N. H. 444; *Rogers v. Mabe*, 4 Dev. 180.

⁵ *Lewis v. Price*, 2 W. Saund. 175; *Angus v. Dalton*, 3 Q. B. D. 85; *Clawson v. Primrose*, 24 Am. L. Reg. 6; *Ricard v. Williams*, 7 Wheat. 59; *Coolidge v. Learned*, 8 Pick. 504; *Sargent v. Ballard*, 9 Pick. 251; *Melvin v. Whiting*, 10 Pick. 297; *Barnes v. Haynes*, 13 Gray, 188; *Blake v. Everett*, 10 Allen, 248; *Pierre v. Fernald*, 26 Maine, 436; *Mitchell v. Walker*, 2 Aik. (Vt.) 269; *Shumway v. Simons*, 1 Vt. 53; *Wakins v. Peck*, 13 N. H. 360; *Wallace v. Fletcher*, 30 N. H. 434; *Olney v. Fenner*, 2 R. I. 211; *Horner v. Stillwell*, 35 N. J. L. 307; *Townsend v. McDonald*, 12 N. Y. 381; *Parker v. Foote*, 19 Wend. 309; *Miller v. Garlock*, 8 Barb. 153; *Shreve v. Voorhees*, 2 Green Ch. 25; *Campbell v. Smith*, 3 Halst. 140; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Postlethwaite v. Payne*, 8 Ind. 104;

its character as adverse twenty years before the right can accrue; but recent acts, acquiesced in by the owner, may go to the jury as evidence that the use has been in derogation of the owner's right for the full term of twenty years.¹

§ 330. According to some decisions, long-continued and uninterrupted possession is merely evidence from which a jury would be justified in presuming a grant;² but, by the

Smith v. Russ, 17 Wis. 227; *Rooker v. Perkins*, 14 Wis. 79; *Cobb v. Smith*, 16 Wis. 661; 38 Wis. 21; *Sherwood v. Vliet*, 20 Wis. 441; *Haag v. DeLorme*, 30 Wis. 591; *Arimond v. Green Bay Co.*, 31 Wis. 316; *Vail v. Mix*, 74 Ill. 127; *Sheuber v. Held*, 47 Wis. 340; *Manier v. Myers*, 4 B. Mon. 514; *Phinzy v. Augusta*, 47 Ga. 260; *Cuthbert v. Lawton*, 3 McCord, 194; *Felton v. Simpson*, 11 Ired. 84; *Griffin v. Foster*, 8 Jones, 337; *Powell v. Lash*, 64 N. C. 456. It is twenty-one years in Ohio and Pennsylvania. *Tootle v. Clifton*, 22 Ohio St. 247; *Buckingham v. Smith*, 10 Ohio, 288, 299; *Cooper v. Smith*, 9 S. & R. 26; *Sleickler v. Todd*, 10 S. & R. 63; *Biedelman v. Foulke*, 5 Watts, 308; *Workman v. Curran*, 89 Penn. St. 226. Fifteen years in Vermont and Connecticut. *Norton v. Valentine*, 14 Vt. 239; *Ford v. Whitlock*, 27 Vt. 265; *Shrewsbury v. Brown*, 25 Vt. 197; *Arbuckle v. Ward*, 29 Vt. 43; *Rogers v. Bancroft*, 20 Vt. 250; *Ingraham v. Hutchinson*, 2 Conn. 584; *Parker v. Hotchkiss*, 25 Conn. 321; *Sherwood v. Burr*, 4 Day, 244; *Rogers v. Page*, *Brayt.* (Vt.) 169. Ten years in Texas and Alabama. *Haas v. Choussard*, 17 Texas, 588; *Baker v. Brown*, 55 Texas, 377; *Wright v. Moore*, 38 Ala. 593. Five years in California. *Campbell v. West*, 44 Cal. 646; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. And seven years by the statutes of Georgia and Tennessee.

¹ *Nash v. Peden*, 1 Spcers, 22. In

Lehigh Valley Railroad Co. v. McFarlan, 43 N. J. L. 605, 617, *Depue, J.*, said: "At common law there was no fixed period of prescription. Rights were acquired by prescription only when the possession or enjoyment was 'time whereof the memory of man ran not to the contrary.' By 20 Hen. III., c. 8, the limitation in writs of right dated from the reign of Henry II. By 3 Edw. I., c. 39, the limitation was fixed from the reign of Richard I. By 21 Jac. I., c. 16, the time for bringing possessory actions was limited to twenty years after the right accrued. These statutes applied only to actions for the recovery of land; none of them embraced actions in which the right to an incorporeal hereditament was involved. But by judicial construction an adverse user of an easement for the period mentioned in the statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from such user to have been once in existence and to have become lost. The fiction of a lost grant seems to have been devised after the statute of James. It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring proffert. Allegation of the loss of the grant excused proffert and bringing the instrument into court."

² *Wallace v. Fletcher*, 30 N. H. 446, citing *Keymer v. Summers*, B.

weight of authority in this country, while the presumption of a lost deed may be rebutted by contradicting or explaining the facts upon which it rests, yet it cannot be overcome by proof in denial of a grant.¹ The adverse enjoyment of the water in a stream for a less period than twenty years is not sufficient to warrant a presumption of a grant, and no superior right in the stream is acquired by mere priority of occupation.² If, therefore, a mill-dam is newly erected above an ancient mill on the same stream, the owner of the ancient mill cannot lawfully increase the height of his dam to a level with the wheel of the new mill, and thus obstruct it by backwater.³ If the plaintiff in his declaration relies upon a prescriptive right to use the water, he cannot recover by proving only that the defendant's dam flows back the water on his mill-wheel, and that his rights as a riparian proprietor are thus infringed.⁴ So, upon the other hand, a plea of a general right to a watercourse is not sustained by proof of a particular right acquired by adverse enjoyment,⁵ nor can the defendant, in an action for diverting a watercourse, avail of a right so acquired, unless set up in his answer.⁶

N. P. 74; *Campbell v. Willson*, 3 East, 294; *Gray v. Bond*, 5 Moore, 327; 2 B. & B. 627; *Cross v. Lewis*, 2 B. & C. 686; *Darwin v. Upton*, 2 W. Saund. 175 a.; *Livett v. Wilson*, 3 Bing. 115; *Jones v. Jones*, 2 Kerr, 265.

¹ *Lehigh Valley Railroad Co. v. McFarlan*, 43 N. J. L. 605; *Coolidge v. Learned*, 8 Pick. 504; *Edson v. Munsell*, 10 Allen, 568; *Wallace v. Fletcher*, 30 N. H. 434, 448; *Pillsbury v. Moore*, 44 Maine, 154; *Burnham v. Kempton*, 44 N. H. 88; *Winipisseogee Lake Co. v. Young*, 40 N. H. 433; *Tracy v. Atherton*, 36 Vt. 510; 2 Greenl. Evid. § 539. To the same effect are numerous English authorities. *Dougal v. Wilson*, 2 W. Saund. 175 a.; *Darwin v. Upton*, Id.; *Hed v. Holcroft*, 1 B. & P. 400; *Balston v. Bensted*, 1 Camp. 463; *Bealey v. Shaw*, 6 East, 208; *Bright v. Walker*, 1 Cr. M. & R. 217; *Jenkins v. Harvey*, Id. 894; *Hillary v. Waller*, 12 Ves. 239;

Wright v. Howard, 1 Sim. & Stu. 203; *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1. The right to flow land by a pond created by a dam attached to an ancient mill-site, is a prescriptive right in a *que estate*. *Sargent v. Gutterston*, 13 N. H. 467.

² *Prescott v. Phillips*, cited 6 East, 283; *Rex v. Wardroper*, 4 Burr. 2024; *Tyler v. Wilkinson*, 4 Mason, 397; *Gilman v. Tilton*, 5 N. H. 231; *Campbell v. Smith*, 3 Halst. 146; *Sherwood v. Burr*, 4 Day, 244; *Buddington v. Bradley*, 10 Conn. 213; *Davis v. Fuller*, 12 Vt. 178; *Pugh v. Wheeler*, 2 Dev. & Bat. 50.

³ *Sumner v. Tileston*, 7 Pick. 198; *ante*, c. 7.

⁴ *Rudd v. Williams*, 43 Ill. 385.

⁵ *Darlington v. Painter*, 7 Penn. St. 473; *Wetmore v. Robinson*, 2 Conn. 529.

⁶ *Matthews v. Ferrea*, 45 Cal. 51.

§ 331. Prescription thus depends, at the present day, upon the presumption of a previous grant or agreement which has been lost by lapse of time.¹ But a grant cannot be presumed with respect to that which in its nature could not be granted, or against a person legally incapable of making it.² An insane person cannot make a binding grant of his real estate, and no prescription begins to run against him until his death or the removal of the disability.³ So, no presumption of a grant arises, from the adverse enjoyment of an easement, against a minor or married woman.⁴ In the case of a reversion, the time of prescription does not begin to run against the reversioner, until his interest becomes so vested or he has such knowledge that a permanent easement is claimed as to give him a cause of action, although the tenant for life or years may permit easements to be acquired by user which will be valid during his tenancy.⁵ Where a company was authorized by act of Parliament to construct

¹ *Rust v. Low*, 6 Mass. 97; *Morse v. Copeland*, 2 Gray, 305; *Edson v. Munsell*, 10 Allen, 557, 567.

² *Barker v. Richardson*, 4 B. & Ald. 579; *Ricard v. Williams*, 7 Wheaton, 109; *Hill v. Lord*, 48 Maine, 96; *Ayraud v. Babin*, 19 Martin (La.) 471; *Jackson v. Johnson*, 5 Cowen, 74.

³ *Edson v. Munsell*, 10 Allen, 557; *Currier v. Gale*, 3 Allen, 328. The general rule is that an intervening disability between the commencement of the adverse enjoyment and the expiration of the twenty years will not defeat the prescriptive right. *Wallace v. Fletcher*, 30 N. H. 434; *Tracy v. Atherton*, 36 Vt. 503; *Andrews v. Mulford*, 1 Hayw. (N. C.) 322; *Mercer v. Selden*, 1 How. 37; *Peck v. Randall*, 1 Johns. 176; *Moore v. White*, 6 Johns. 360; *Dekay v. Darrah*, 2 Green (N. J.) 288; *Clark v. Richards*, 3 Id. 347; *McFarland v. Stone*, 17 Vt. 165. But the minority of an heir who succeeds to the dominant tenement during the twenty years has been held to interrupt the prescription. *Melvin v. Whiting*, 13

Pick, 188; *Watkins v. Peck*, 13 N. H. 360; *Lamb v. Crosland*, 4 Rich. (S. C.) 536.

⁴ *Reiner v. Stuber*, 20 Penn. St. 458; *Watkins v. Peck*, 13 N. H. 360. See *Tyler v. Wilkinson*, 4 Mason, 402.

⁵ *Saunders v. Annesley*, 2 Sch. & Lef. 101; *Baxter v. Taylor*, 4 B. & Ad. 72; *Barker v. Richardson*, 4 B. & Ald. 578; *Wood v. Veal*, 5 B. & Ald. 454; *Doe v. Reed*, *Ibid.* 232; *Gray v. Bond*, 2 Bro. & Bing. 667; *Dawson v. Norfolk*, 1 Price, 246; *Daniel v. North*, 11 East, 372; *Yard v. Ford*, 2 W. Saund. 175 a.; *McGregor v. Wait*, 10 Gray, 72; *Parker v. Framingham*, 8 Met. 260; *Lund v. New Bedford*, 121 Mass. 286; *Wallace v. Fletcher*, 30 N. H. 434; *Tinsman v. Belvidere Railroad Co.*, 25 N. J. L. 255; *Schenley v. Commonwealth*, 36 Penn. St. 29; *Reimer v. Stuber*, 20 Penn. St. 458. Leasing the servient estate to a tenant after the time of prescription has begun to run would not prevent the acquisition of the right. *Cross v. Lewis*, 2 B. & C. 686; *Mebane v. Patrick*, 1 Jones, 23.

and operate a canal for public use, and the defendant pleaded a prescriptive right to draw water therefrom for operating a mill and steam engine erected upon the banks, the court held that such right could not be maintained, for it implied an original grant thereof by the company, which had no right to make such a grant or to use the water for any purpose except for that of a canal.¹ In *Burbank v. Fay*,² in New York, it was held that, as the canal commissioners could not grant the State canals, no right adverse to the State could be acquired by a private use of the waters of such canals, whether adverse or by permission. In *Mayor of Saltash v. Goodman*,³ the defendants claimed, as free inhabitants of ancient tenements in a borough, and also as free inhabitants of the borough and as subjects of the realm, to have, without interruption and as of right, the privilege of dredging for oysters in a public navigable river, and the plaintiffs claimed to be possessed of the soil and a several fishery in the river. The plaintiffs proved a *prima facie* right to a several fishery, and it was held that the defendants' claim of immemorial user could not be established, being made in respect of a fluctuating body, and that the presumption of a lost royal grant, which alone could incorporate such a body, could not be made in opposition to the right proved by the plaintiffs.

§ 332. The title to an easement by adverse user is to be distinguished from a title to land claimed by adverse possession. In the latter case, a mere verbal protest or prohibition to occupy the premises is not sufficient without entry to defeat the right acquired by disseisin.⁴ But in the case of an easement, the title rests chiefly on the owner's acquies-

¹ *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 315; *Staffordshire Canal v. Birmingham Canal*, L. R. 1 H. L. 254; 11 Jur. 71; *National Manure Co. v. Donald*, 4 H. & N. 8; *Sapp v. Northern Central Railway Co.*, 51 Md. 125; *Armstrong v. Pennsylvania Railroad Co.*, 38 N. J. L. 1; *Lehigh Valley Rail-*

road Co. v. McFarlan, 43 N. J. L. 605, 621; *ante*, § 225.

² 65 N. Y. 57. See *Jessup v. Loucks*, 55 Penn. St. 350; *Cass v. Pennsylvania Railroad Co.*, 51 Penn. St. 351.

³ 5 C. P. D. 431; 7 Q. B. D. 106.

⁴ *Workman v. Curran*, 89 Penn. St. 226; *Smith v. Miller*, 11 Gray, 145; *Bowen v. Guild*, 130 Mass. 121.

cence in the adverse use, and the presumption of a grant may be rebutted by proof of declarations without evidence of opposition to the use by suit at law or by forcible resistance.¹ Where, for example, an easement in an aqueduct on another's land was claimed by adverse user, and it appeared that the owner of the servient tenement had forbidden his neighbor to enter, and had ordered him off the land while there for the purpose of repairing the aqueduct, it was held that these verbal orders were admissible to show an interruption of the easement, and that it was not necessary to use actual force to eject, in order to break the continuity of possession and use.² If a suit is brought within twenty years against the occupants of a mill-dam and is compromised, this fact is admissible in evidence to rebut the presumption of an easement by prescription.³ In *Kimball v. Ladd*,⁴ the Supreme Court of Vermont held that acts may amount to acquiescence, even when there are verbal objections, and that the owner of a lower mill, who claims the right to have the water come to him through the flume and gates of an upper mill, may acquire a prescriptive right to the continued flow of the water as the upper mill-owner permits it to run, whatever the latter may say in denial of his claim.

§ 333. Long enjoyment of an easement establishes a right to the easement, but not to the land itself,⁵ and the acquisition, by adverse enjoyment, of the privilege of ponding back water on another's land does not prevent the latter from conveying the right of soil.⁶ A riparian proprietor whose title extends *usque ad filum aquae*, may acquire by

¹ *Ibid.*; *Chicago Railway Co. v. Hoag*, 90 Ill. 339; *Stillman v. White Rock Co.*, 3 Wood. & M. 533, 549; *Nichols v. Aylor*, 7 Leigh, 546; *Field v. Brown*, 24 Gratt. 74; *Tyler v. Wilkinson*, 4 Mason, 397; *Pierce v. Cloud*, 42 Penn. St. 102. Where a dam is built under authority from the State, acquiescence is not presumed on the part of the owner of land flowed by the dam. *Jessup v. Loucks*, 55 Penn. St. 350.

² *Powell v. Bagg*, 8 Gray, 441; *Tracy v. Atherton*, 36 Vt. 514; *Ingraham v. Hough*, 1 Jones, 39.

³ *Postlethwaite v. Payne*, 8 Ind. 104; *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 287. See *Langford v. Poppe*, 56 Cal. 73.

⁴ 42 Vt. 747.

⁵ *Schuylkill Navigation Co. v. Stoe-ver*, 2 Grant Cas. 462.

⁶ *Everett v. Dockery*, 7 Jones (N. C.) 390.

prescription the right to maintain a dam across the stream and to abut it on the opposite shore.¹ If there is no claim of right to the land on which the dam is built, only an easement will be gained; but the erection of a dam on the land of another, and maintaining it, uninterruptedly and under a claim of right to the land for a period of twenty years, with the acquiescence and knowledge of the owner of the land, and during all the same period flowing the land of a third person above on the stream with his knowledge and acquiescence, gives a title by adverse possession to the land on which the dam is located, and a right by prescription to flow the land of such third person situated above on the stream.² If a highway extending across a stream is used as a dam for twenty years without interruption on the part of the State, or objection on the part of the owner of land which is flowed by the pond, the latter cannot maintain an action for the injury to his land.³ In support of a claim of title to the whole bed of a river on which the plaintiff's land bounds, he is entitled to submit to the jury acts of ownership, such as the taking of stones, not only in that part of the river which lies between the lands of the plaintiff and the defendant, but along the bed of the river beyond the defendant's land.⁴ In *Ridgway v. Ludlow*,⁵ in Indiana, it was held that a title acquired by adverse possession to land adjoining an unnavigable lake within the congressional survey carried with it the bed of the lake to its thread, and that the entry of the original owner, within the period of prescription, upon the bed of the lake, from which the water had receded, and the removal therefrom of its natural products, did not affect the claimant's title, these acts not being with his knowledge, or accompanied by any assertion of ownership.

¹ *Bliss v. Rice*, 17 Pick. 23; *Pratt v. Lamson*, 2 Allen, 275, 288; *Bøidelman v. Foulk*, 5 Watts, 308; *Burnham v. Kempton*, 44 N. H. 78.

² *Trask v. Ford*, 39 Maine, 437; *Chalk v. McAlily*, 11 Rich. (S. C.) 153; *Perrin v. Garfield*, 37 Vt. 304; *Thompson v. Androscoggin Bridge*, 5 Maine, 62; *Dryden v. Jepherson*, 18 Pick. 392.

³ *Borden v. Vincent*, 24 Pick. 301; *Lawrence v. Fairhaven*, 5 Gray, 114; *Perley v. Hilton*, 55 N. H. 444.

⁴ *Jones v. Williams*, 2 M. & W. 326; *Attorney General v. Portsmouth*, 25 W. R. 559.

⁵ 58 Ind. 248. See *Clarke v. Wagner*, 74 N. C. 791.

§ 334. In order to establish the presumption of a right or easement in the lands or waters of another person, the enjoyment must have been uninterrupted, adverse, and under a claim of right, and with the knowledge of the owner.¹ It must have been inconsistent with or contrary to the interests of the owner, and of such a nature that it is difficult or impossible to account for it except on the presumption of a grant from him.² If the use or enjoyment has been consistent with the continuance of his right or title, no such presumption arises. In order to establish a prescriptive right to a certain flow of water from another's reservoir higher up the stream, the owner of the dam must not have merely permitted the water to flow as demanded without intending to acknowledge any right on the part of the lower proprietor, for so equivocal an act would not justify a presumption of an adverse user or enjoyment.³ So, the erection of a dam across a stream to raise a head of water for the purpose of driving wheels and machinery in a mill, and the cutting of canals, sluices, and water-ways to conduct, apply, and discharge the water, although they may change in some degree the natural flow of the stream and cause a temporary obstruction to the passage of the water, yet, if they do not essentially affect the reasonable use of the current by the riparian proprietors above and below for similar purposes, they would not be inconsistent with the rights of such proprietors, and would not be deemed to confer any right or to take away any title or privilege.⁴ If, on the other hand, the

¹ *Livett v. Wilson*, 3 Bing. 115; *Coalter v. Hunter*, 4 Rand. (Va.) 58; *Stokes v. Upper Appomattox Co.*, 3 Leigh, 318; *Chicago Railway Co. v. Hoag*, 90 Ill. 339; *Ingraham v. Hutchinson*, 2 Conn. 584; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Flora v. Carbean*, 38 N. Y. 111; *Trask v. Ford*, 39 Maine, 437; *Smith v. Miller*, 11 Gray, 145; *Kilburn v. Adams*, 7 Met. 33; *Hannefin v. Blake*, 102 Mass. 297; *Perrin v. Garfield*, 37 Vt. 310; *Arnold v. Stevens*, 24 Pick. 110; *Wilson v. Wilson*, 4 Dev. 154.

² *Morse v. Williams*, 62 Maine, 445; *Brace v. Yale*, 10 Allen, 444.

³ *Vliet v. Sherwood*, 35 Wis. 229; 38 Wis. 159.

⁴ *Brace v. Yale*, 10 Allen, 444; *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.*, 13 Gray, 451; *Donnell v. Clark*, 19 Maine, 174; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576; *Platt v. Johnson*, 15 Johns. 213; *Shreve v. Voorhees*, 2 Green Ch. 25. This is upon the principle that no prescriptive right is ac-

mode of controlling and regulating the use of the water essentially interrupts the original and natural flow of the water, and interferes materially with the right of other riparian owners to appropriate and use the water, it is, in its nature, adverse, and, if continued for twenty years, affords a conclusive presumption of a grant of such appropriation and use.¹ Where a judgment of ouster is entered, upon a proceeding in the nature of a *quo warranto*, against a corporation owning a mill privilege, upon which it has erected and maintained a dam, a grantee of the corporation who acquired his title before such judgment was entered, and who has maintained the dam for more than twenty years after the judgment, gains a prescriptive right to maintain the same as against the owner of the land which it flows.²

§ 335. In order to support an easement by prescription, the adverse use must have been continuous.³ A person cannot claim an easement in his own land, and the time during which the claimant may have owned or leased the servient tenement cannot be counted in computing the length of enjoyment, nor can any length of user of a ditch or dam entirely on one's own land be connected with a consequential injury resulting therefrom to a neighbor's land and continued for an insufficient period.⁴ But the times of enjoyment by an ancestor and his heir, or by a seller and the purchaser, may be counted together in order to make up the

quired where the person against whom the right is claimed could not have interrupted or prevented the exercise of the subject of the supposed grant. *Webb v. Bird*, 13 C. B. n. s. 841; *Winship v. Hudspeth*, 10 Exch. 5; *Chase-more v. Richards*, 7 H. L. Cas. 349; *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Nelson v. Butterfield*, 21 Maine, 220.

¹ *Ibid.*; *Newhall v. Ireson*, 8 Cush. 595. The erection of a new and higher dam in place of an old one is not an infringement of another's prescriptive right to use the water, if such use is not thereby prejudiced. *Rogers v. Bruce*, 17 Pick. 184.

² *Campbell v. Talbot*, 123 Mass. 174.

³ *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 631; *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267; *Ward v. Robins*, 15 M. & W. 237; *Pollard v. Barnes*, 2 Cush. 191; *Tyler v. Mather*, 9 Gray, 177; *Bodfish v. Bodfish*, 105 Mass. 317.

⁴ *Mansur v. Blake*, 62 Maine, 38; *Polly v. McCall*, 37 Ala. 20; *Roundtree v. Brantley*, 37 Ala. 544; *Wilder v. Clough*, 55 N. H. 359; *Reed v. Earnhart*, 10 Ired. 516; *Haag v. Delorme*, 30 Wis. 594; *Holland v. Long*, 7 Gray, 486; *Olney v. Gardiner*, 4 M. & W. 496.

requisite period,¹ and it is sufficient *prima facie* proof of a prescription for a general easement, as of a right of way for all purposes, to show the actual exercise of the right for more than twenty years for all the purposes for which its exercise was required at different times, although for some of those purposes it was first used in fact within that period.² An occasional suspension or interruption of the enjoyment will not defeat the right, if it arises from such causes as the dryness of the season,³ or a temporary failure to exercise the right to the extent claimed,⁴ or fluctuations in the flow of the stream.⁵ So an entry by stealth, or for purposes other than those connected with the right to enter, will not break the continuity of exclusive possession in another.⁶

§ 336. The diversion of water from a stream by means of a trench is substantially continuous, although subject to interruption during a part of each year by the owner of the land through which the trench is dug.⁷ Where a prescriptive right to flow land is claimed, the question is not whether the claimant alone and exclusively has caused the land to be flowed, but whether he has flowed it uninterruptedly for a particular purpose; and it is, therefore, no objection to the acquisition of such a right by prescription that the flowing was caused by different dams owned by

¹ *Sargent v. Ballard*, 9 Pick. 251; *Branch v. Doane*, 18 Conn. 233; 17 *Leonard v. Leonard*, 7 Allen, 277; *Conn.* 402. If the different parties do not claim under the same title, or one of them within the twenty years occupies by permission of the owner of the servient tenement, the continuity is broken. *Winship v. Hudspeth*, 10 Exch. 5; *Benson v. Soule*, 32 Maine, 39; *Perrin v. Garfield*, 37 Vt. 309.

² *Dare v. Heathcote*, 25 L. J. (N. S.) Ex. 245; *Cowling v. Higginson*, 4 M. & W. 245; *Davies v. Stephens*, 7 C. & P. 570.

³ *Hall v. Swift*, 6 Scott, 167; *Tyler v. Wilkinson*, 4 Mason, 397; *Geranger v. Summers*, 2 Ired. 229; *Haag v. Delorme*, 30 Wis. 591.

⁴ *Wood v. Kelley*, 30 Maine, 47. See *Bodfish v. Bodfish*, 105 Mass. 317;

⁵ *Winnipissee Lake Co. v. Young*, 40 N. H. 436; *Tyler v. Wilkinson*, 4 Mason, 397; *Perrin v. Garfield*, 37 Vt. 310. See *Curtis v. Angier*, 4 Gray, 547; *Plympton v. Converse*, 42 Vt. 712; *Carr v. Foster*, 3 Q. B. 581.

⁶ *Burrows v. Gallup*, 32 Conn. 493.

⁷ *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Cowell v. Thayer*, 5 Met. 257.

different persons, one of whom exercised the right of flowage for the purpose of floating logs, and another for the purpose of working mills.¹ If a watercourse is first obstructed by a temporary dam erected to aid in the construction of a permanent dam, which is afterwards built, and not as a means of enjoying or appropriating the water for any of the purposes for which the second dam is intended, the maintenance of the temporary dam is not an assertion of a permanent right to raise the water, and the time during which it is maintained is not to be computed as part of the period of prescription for setting back the stream.² So if a dam is permitted to be out of repair for an unreasonable time, as for one or more years, during which the land above is not flowed, the prescriptive right of flowage is interrupted and must begin anew.³

§ 337. The user to be adverse must be attended by such circumstances of notoriety that the person against whom the right is exercised may have reasonable notice that the right is claimed against him, and be enabled to resist its acquisition before the period of prescription has elapsed.⁴ Thus, the occasional use of flash boards for brief periods, when little or no injury may be done, does not amount to that open and uninterrupted use which is required.⁵ Such boards may be used so continuously as to make them a part of the permanent structure, and by such user a right to flow to the height of such boards may be acquired;⁶ but their use only during times of low water, though for more than twenty years, does not justify keeping the water to the height of such boards during the whole year.⁷ It is a ques-

¹ *Davis v. Brigham*, 29 Maine, 391; *Kent v. Waite*, 10 Pick. 138.

² *Branch v. Doane*, 17 Conn. 402, 419; 18 Conn. 233. See *Durgin v. Leighton*, 10 Mass. 56.

³ *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Metz v. Darney*, 25 Penn. St. 519; *Barber v. Nye*, 65 N. Y. 221; *Olney v. Gardiner*, 4 M. & W. 500. See *Dana v. Valentine*, 5 Met. 8.

⁴ *Gilford v. Winnipisseogee Lake*

Co., 52 N. H. 262; *Solomon v. Vintners' Co.*, 4 H. & N. 602; *O'Neil v. Blodgett*, 53 Vt. 213.

⁵ *Pierce v. Travers*, 97 Mass. 306; *Marcy v. Shults*, 29 N. Y. 346; *Hall v. Augsbury*, 46 N. Y. 622; *Carlisle v. Cooper*, 21 N. J. Eq. 596.

⁶ *Ibid.*

⁷ *Ibid.*; *Marcy v. Shults*, 29 N. Y. 346.

tion of fact for the jury whether such user has established the right;¹ and if within twenty years the claimant has been ordered by an upper proprietor to remove the flash boards from his dam, and has acquiesced and admitted that he had no right to use them, the presumption of a grant is defeated.² The maintenance of a mill-dam is an act of sufficient notoriety to raise a presumption of knowledge on the part of the land-owner;³ but the long-continued use of a drain beneath different houses would not give rise to such presumption, if the course of the drain was not known to any of the owners of the houses.⁴ If the water in a mill-pond gradually subsides in consequence of the decay of the dam, the owner of an adjoining meadow, who has title to the edge of the pond when full, and whose cattle wander from the meadow over the bottom of the pond, does not thereby acquire title by adverse possession to the bed of the pond in the absence of further notice of such a claim to its owner.⁵

§ 338. The enjoyment must also be as of right, and not by license or merely permissive.⁶ "If," says Chapman, J.,⁷ "the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right."⁸ So an occupation of land under a parol gift from the owner is an occupation as of right.⁹ So if under a parol contract by a tenant in common.¹⁰

¹ *Noyes v. Silliman*, 24 Conn. 15; *Branch v. Doane*, 18 Conn. 233; 17 Conn. 402; *Pollard v. Barnes*, 2 Cush. 191.

² *Sumner v. Tileston*, 7 Pick. 198.

³ *Perrin v. Garfield*, 37 Vt. 311.

⁴ *Carbrey v. Willis*, 7 Allen, 368; *Hannefin v. Blake*, 102 Mass. 297.

⁵ *Eddy v. St. Mars*, 53 Vt. 462.

⁶ *Cholmondeley v. Clinton*, 2 Jac. & W. 1; *Bright v. Walker*, 1 C. M. & R. 219; *Baker v. Boston*, 12 Pick. 184; *White v. Chapin*, 97 Mass. 101; *Kilburn v. Adams*, 7 Met. 33; *Paine v. Hutchins*, 49 Vt. 317; *Postlethwaite v. Payne*, 8 Ind. 104; *Mebane v. Patrick*, 1 Jones (N. C.) 23; *Hall v.*

McLeod, 2 Met. (Ky.) 98; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Corning v. Troy Iron Factory*, 40 N. Y. 191; *Babcock v. Utter*, 1 Keyes, 391, 115; 1 Abb. Dec. 27; *Ingraham v. Hough*, 1 Jones, 39; *Winter v. Winter*, 8 Nev. 129. The mere fact that the use began in a trespass does not show that it was not continued under a claim of right. *Sibley v. Ellis*, 11 Gray, 417.

⁷ *Stearns v. Janes*, 12 Allen, 582.

⁸ *Ashley v. Ashley*, 4 Gray, 197; *Kimbrall v. Walker*, 7 Rich. (S. C.) 422.

⁹ *Sumner v. Stevens*, 6 Met. 337; *Legg v. Horn*, 45 Conn. 415.

¹⁰ *Leonard v. Leonard*, 10 Mass. 281.

In such cases the law presumes, after the lapse of twenty years, that a legal conveyance was made. But the character of the use or occupation depends upon the language used and the manner of the enjoyment. If the language is such as to create only a license or a lease, the enjoyment is regarded as permissive, and not as of right, and no title is acquired by it.”¹

§ 339. The presumption of a grant is rebutted if the person prescribing for the easement acknowledges the right of the owner within the twenty years, though he does it under a mistake of his own rights.² So the asking leave to exercise the right from time to time within the period of prescription breaks the continuity of the enjoyment as of right, inasmuch as each asking of leave is an admission that, at that time, the person so asking had no title;³ but the right, when fully established by adverse use, is not lost by asking and receiving a license from the original owner, although this may, in case of doubt, be strong evidence that the previous use was not under a claim of right.⁴ It is not necessary that there should be an express claim of the right by the person who enjoys it, or an express admission of the right by the owner of the land.⁵ In *Outram v. Maude*,⁶ the plaintiff was yearly tenant, from 1791 to 1836, of an underground channel for conducting water from the plaintiff's mill through the landlord's land. This demise was determined in 1836, and a demise of a new channel, for pure water only, continued in force until 1867, when it was determined by the

¹ *Cheever v. Pearson*, 16 Pick. 266.

² *Mitchell v. Walker*, 2 Ark. (Vt.) 266.

³ *Monmouthshire Canal Co. v. Harford*, 1 C. M. & R. 614; 5 Tyrwh. 68; *Tickle v. Brown*, 4 Ad. & El. 369, 382; *Beasley v. Clarke*, 2 Bing. N. C. 705, 709; *Watkins v. Peck*, 13 N. H. 360; *Pierce v. Cloud*, 42 Penn. St. 102. Any possession of land which is accompanied by the recognition of a superior title still existing, is not adverse to that title. *Griswold v. Butler*, 3 Conn. 246. But when a person

takes possession under a parol agreement for a purchase, and pays for the land, or purchases it and takes a deed which is defective, the ensuing possession of the purchaser is *prima facie* under a claim of title in himself, and is, therefore, adverse. *South School District v. Blakeslee*, 13 Conn. 235.

⁴ *Tracy v. Atherton*, 36 Vt. 503; *Perrin v. Garfield*, 37 Vt. 304.

⁵ *Blake v. Everett*, 1 Allen, 248; *Johnson v. Gorham*, 38 Conn. 513; *Law v. McDonald*, 9 Hun, 23.

⁶ 17 Ch. D. 391; 29 W. R. 818.

defendant, the landlord's successor. The plaintiff, however, continued to use the old channel for foul water from 1836 to 1879. It was held that, being a tenant, he had not acquired an easement by prescription in the old channel, although the user thereof was uninterrupted.

§ 340. Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or have annexed to them a duty to be performed for the benefit of the person against whom the prescription exists.¹ So, there may be a negative as well as an affirmative easement in another's land acquired by adverse enjoyment. If a prescriptive right has been gained to divert a stream from its natural channel, the proprietors below along that channel may claim exemption from having their lands overflowed or their mills injured by the restoration of the water to its natural course.² In *Felton v. Simpson*,³ the Supreme Court of North Carolina held that the owner of land protected by a dam which ponded the water in heavy falls of rain until it was drained off by ditches leading from the pond through the plaintiff's land, could not gain a prescriptive right to the benefit of this protection, inasmuch as there was nothing which could be granted, and no adverse possession of anything which, without a grant, would expose the party to an action. The submission to the exercise of an easement by the owner of the dominant estate, for his own purposes and in his own way, does not necessarily give the servient owner a right to the continuance of the easement imposed, because it is attended with incidental advantages to the latter; but the former may, if he chooses, cease to exercise it entirely.⁴

¹ *Brook v. Willett*, 2 H. Black. 224; *Paddock v. Forrester*, 3 Man. & G. 903; *Gray's Case*, 5 Rep. 79; *Carlisle v. Cooper*, 21 N. J. Eq. 597; *Mitchell v. Walker*, 2 Aik. (Vt.) 270; *Watkins v. Peck*, 13 N. H. 360, 375.

² *Shepardson v. Perkins*, 58 N. H. 354; *Middleton v. Gregorie*, 2 Rich. (S. C.) 631, 638; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Belknap v. Trimble*, 3 Paige, 577. So of the right to keep the end of an ancient ditch closed which has been closed for twenty years. *Drewett v. Sheard*, 7 C. & P. 465.

³ 11 Ired. 84.

⁴ *Beeston v. Weate*, 5 El. & Bk. 986; *Magor v. Chadwick*, 11 Ad. & El. 571; *North Eastern Railway v. Elliot*, 1 John. & H. 154; *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *White v. Chapin*, 12 Allen, 516; *Yale v. Brace*, 99 Mass. 488.

An active enjoyment for more than the statutory period is not an enjoyment as of right, if during the period it was known that it is only permitted so long as some particular purpose was served. Where a canal company was authorized, but not required, by statute to divert the waters of a stream, which they did for a period of forty years, it was held that the riparian proprietors below on the stream had no right to insist that the diversion should be continued for their benefit, although the natural channel had meanwhile been choked up, and the restoration of the water to that channel caused their lands to be overflowed in times of flood.¹

§ 341. In order to make the use of an easement for twenty years conclusive of the right, the person who claims it has the burden of proof to establish that the use was adverse, uninterrupted, and known to the owner of the land, and each of these essential ingredients to the maintenance of the claim may be contradicted and disproved.² If the possession is adverse, the jury should regard it as strong ground on which to found the presumption of a grant.³ If the use of the easement for twenty years is unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and it is incumbent upon the owner of the servient tenement to show that the use was under some license or special contract inconsistent with a claim of right.⁴ So proof of a qualified

¹ *Mason v. Shrewsbury Railway Co.*, L. R. 6 Q. B. 578; *Arkwright v. Gell*, 5 M. & W. 220; *Greatrex v. Hayward*, 8 Exch. 291; *ante*, § 225.

² *Haight v. Price*, 21 N. Y. 241; *Bradley Fish Co. v. Dudley*, 37 Conn. 136, 148; *Smith v. Miller*, 11 Gray, 149; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *American Co. v. Bradford*, 27 Cal. 360; *Miller v. Stowman*, 26 Ind. 143; *Ogle v. Dill*, 55 Ind. 130.

³ *Campbell v. Wilson*, 3 East, 303; *Bullen v. Runnels*, 2 N. H. 255; *Stevens v. Taft*, 11 Gray, 33; *Chalk v. McAlilly*, 11 Rich. 153; *Esling v. Williams*, 10 Penn. St. 126.

⁴ *White v. Chapin*, 12 Allen, 516, 519; *Perrin v. Garfield*, 37 Vt. 310; *Hammond v. Zehner*, 21 N. Y. 118; *Law v. McDonald*, 9 Hun, 23; *Melvin v. Locks & Canals*, 16 Pick. 137; *White v. Loring*, 24 Pick. 319; *Garrett v. Jackson*, 20 Penn. St. 331; *Steffy v. Carpenter*, 37 Penn. St. 41; *Wilson v. Wilson*, 4 Dev. 154; *Cross v. Lewis*, 2 B. & C. 686; *Miller v. Garlock*, 8 Barb. 153; *Hart v. Vose*, 19 Wend. 365. The force of the presumption is not diminished when the owners of the two tenements claim under a common grantor. *White v. Chapin*, 12 Allen, 520.

right as to time is to be produced by the party who claims that it was so qualified.¹ Under the foregoing rules the presumption of a grant, according to the circumstances of each case, is to be generally regarded as one of fact and not of law.²

§ 342. Rights gained by prescription are limited in extent by the previous enjoyment, and cannot be materially varied to the injury of others,³ unless the new use has been the same continuously for a long period of years, and is itself a prescriptive right,⁴ The long enjoyment of a ditch raises no presumption of the right to use another ditch which differs therefrom in an appreciable degree, either in locality or dimensions.⁵ Where certain mill-owners had maintained a dam across a river for thirty years, and taken the water through a village in an artificial channel which ran by the side of a highway and within its limits, it was held that the town was entitled to recover damages for injury to the highway caused by an increased flow of the water in the channel resulting from a higher and tighter dam erected in place of that first built.⁶ So, the right to use an artificial ditch through another's land for irrigation, with the privilege of entering and clearing the same, does not justify the conversion of the ditch into the tail-race of a mill, and its enlargement and deepening for that purpose.⁷ Where the user consists in taking fish on a beach without a capstan and reel,

¹ *Matter of Water Commissioners*, 4 Edw. Ch. 545; *Finch v. Resbridger*, 2 Vernon, 391.

² *Townsend v. Downer*, 32 Vt. 183; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

³ *Bealy v. Shaw*, 6 East, 208; *Brown v. Best*, 1 Wils. 174; *Strutt v. Bovingdon*, 5 Esp. 56; *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 3 Eq. 279; *Carlisle v. Cooper*, 21 N. J. Eq. 594; 19 Id. 256; 17 Id. 525; *Norway Plains Co. v. Bradley*, 52 N. H. 86, 103; *Russell v. Scott*, 9 Cowen, 279; *Wilklow*

v. Lane, 37 Barb. 244; *Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v. Calkins*, 10 Wend. 167; *Peterson v. McCullough*, 50 Ind. 35; *Mitchell v. Parks*, 26 Ind. 354.

⁴ *Prentice v. Geiger*, 9 Hun, 350; 74 N. Y. 341; *Cotton v. Pocasset Manuf. Co.*, 13 Met. 429; *Stein v. Burden*, 24 Ala. 130.

⁵ *Porter v. Durham*, 74 N. C. 767.

⁶ *Shrewsbury v. Brown*, 25 Vt. 197, *Darlington v. Painter*, 7 Penn. St. 473.

⁷ *Darlington v. Painter*, 7 Penn. St. 473.

this does not authorize setting up a capstan and reel on such beach for the purpose of taking fish more conveniently.¹

§ 343. The extent of the right of flowage acquired by adverse enjoyment over another's land is not determined by ascertaining how long the claimant's dam or mill has been in existence, or by the claim which he makes during the period of prescription.² The question is not how high the dam is, but whether the water has been held during the requisite period so high as to affect the land flowed as injuriously as it did at the time when the owner of such land brings his action,³ and it is incumbent upon the claimant to show that his privilege entitles him to pond it as high as at present.⁴ The period of limitation begins to run from the time when the land was first flowed or received actual injury, and not from the erection and completion of the dam.⁵ To an action for damages by the owner of land adjoining a river, for obstructing the river and causing the water to overflow his lands, the defendant pleaded that he was possessed of a mill near said lands, and that for twenty years the occupiers thereof enjoyed, as of right and without interruption, the right of maintaining a weir and mill-dam across the river, and penning back the water for said mill, and that the grievances were a user by the defendant of this right. This

¹ *Hart v. Chalker*, 5 Conn. 311. See *Melvin v. Whiting*, 13 Pick. 184; *McFarlin v. Essex Co.*, 10 Cush. 304.

² *Hulme v. Shreve*, 3 Green Ch. 116; *Carlisle v. Cooper*, 21 N. J. Eq. 594; 19 Id. 256; 17 Id. 525; *Horner v. Stillwell*, 35 N. J. L. 307; *Burnham v. Kempton*, 44 N. H. 78; *Bucklin v. Truell*, 54 N. H. 122; *Russell v. Scott*, 9 Cowen, 279; *Baldwin v. Calkins*, 10 Wend. 167; *Rogers v. Bruce*, 17 Pick. 184; *O'Brien v. Enright*, Ir. R. 1 C. L. 718; *Flight v. Thomas*, 10 Ad. & El. 590; *Smith v. Russ*, 17 Wis. 227; *Sabine v. Johnson*, 35 Wis. 185, 202; *Powell v. Lash*, 64 N. C. 456; *Jenkins v. Conley*, 70 N. C. 353; *Grigsby v. Clear Lake Co.*, 40 Cal. 407.

³ *Ibid.*; *Postlethwaite v. Payne*, 8 Ind. 104; *Mentz v. Darney*, 25 Penn. St. 519; *Stiles v. Hooker*, 7 Cowen, 266; *Ellington v. Bennett*, 59 Ga. 286; *Smith v. Russ*, 17 Wis. 227. A claim by grant differs from one by prescription, in that the right of the grantee in the grant is not affected by the fact that he has not at all times exercised his privilege to its full extent. *Lacy v. Arnett*, 33 Penn. St. 169.

⁴ *Morris v. Commander*, 3 Ired. 510.

⁵ *Hurlburt v. Leonard*, Brayt. (Vt.) 202; *Nelson v. Butterfield*, 21 Maine, 220; *Wentworth v. Sanford Manuf. Co.*, 33 Maine, 547; *Delaware Canal Co. v. Wright*, 21 N. J. L. 469.

plea was held to be bad, as it did not allege previous user that caused damage to the plaintiff's lands.¹

§ 344. The general rule is that the height of the dam, when in good condition and repair, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or variations in the stream caused by drought or in the pondage of the dam by its being drawn down by use.² This rule regulates the right of the owner of a dam who claims by prescription.³ The owner of the easement is not bound to use the water in the same manner, or to apply it to the same mill or the same purpose.⁴ He may at his pleasure make alterations or improvements or increase the capacity of the machinery which is propelled by the water, if the burden upon the servient tenement is not increased.⁵ So, it is not necessary that the dam should have been maintained for the

¹ O'Brien v. Enright, Ir. R. 1 C. L. 718; 15 W. R. 637.

² Carlisle v. Cooper, 21 N. J. Eq. 595; Cowell v. Thayer, 5 Met. 253, 258; Bliss v. Rice, 17 Pick. 23; Jackson v. Harrington, 2 Allen, 242; Gifford v. Winnipisseogee Lake Co., 52 N. H. 262; Manier v. Myers, 6 B. Mon. 134; Winnipisseogee Lake Co. v. Young, 40 N. H. 420; Vickerie v. Buswell, 13 Maine, 289; Wood v. Kelly, 30 Maine, 47; Alder v. Savill, 5 Taunt. 454; Gerenger v. Summers, 2 Ired. 229; Baker v. McGuire, 53 Ga. 245; Maguire v. Baker, 57 Ga. 109; Lane v. Miller, 27 Ind. 534. In Cowell v. Thayer, 5 Met. 258, it was held that the right to maintain a particular dam, acquired by prescription or grant, includes the right to tighten and repair such dam, although the consequence may be a greater flowing than had been usual. This rule does not apply when there is an express agreement; Short v. Woodward, 13

Gray, 86; and is disapproved in Wisconsin and New Hampshire. Smith v. Russ, 17 Wis. 227; Sabine v. Johnson, 35 Wis. 185; Burnham v. Kempton, 44 N. H. 90; Griffin v. Bartlett, 55 N. H. 123; Carlisle v. Cooper, *supra*. The height of a dam should be fixed by experiment, not by theoretical conclusions based upon surveys. Decorah Woolen Co. v. Greer, 58 Iowa, 86; 49 Iowa, 490; *ante*, § 209.

³ Daniels v. Citizens' Savings Institution, 127 Mass. 534.

⁴ Luttrell's Case, 4 Rep. 87; Saunders v. Newman, 1 B. & Ald. 258; Hale v. Oldroyd, 14 M. & W. 789; Baxendale v. McMurray, L. R. 2 Ch. 790; Hall v. Swift, 6 Scott, 167; Whittier v. Cochecho Manuf. Co., 9 N. H. 454; Casler v. Shipman, 35 N. Y. 533; Biglow v. Battle, 15 Mass. 513; Miller v. Lapham, 46 Vt. 525; McDonald v. Bear River Co., 13 Cal. 220.

⁵ *Ibid*.

whole period upon the same spot, if the lines of the actual enjoyment of the easement are not changed.¹ The right to keep up the dam may be subject to limitations during a part of each year. If the modification of the right to flow is for the haying season, or the period required for the getting off of the hay from the meadow below, the extent of that modification is measured by the time reasonably required in each year for that purpose, and not by the extreme limits of time over which the haying season may have extended in any of the different years during the acquisition of the right.²

§ 345. The right to pollute a stream to a greater extent than is permissible of common right may be acquired by prescription.³ So may the right of placing cinders and other refuse of works on the banks and bed of a stream.⁴ A tanner does not acquire the right to deposit bark upon the land of a lower proprietor by the continued casting of the bark into the stream for twenty years, unless it has been annually deposited on such land during the whole of that period.⁵ So, the mere use for the statutory period of a ditch, the washings of which cause an accumulation of sand in a stream, and a consequent flooding of the plaintiff's land, does not establish an injury to such land during the same length of time.⁶ As the right is measured by the enjoyment, one proprietor cannot acquire a right by prescription to pollute the stream to a greater extent than it was polluted at the

¹ *Davis v. Brigham*, 29 Maine, 391; *Stackpole v. Curtis*, 32 Maine, 383; *Carlisle v. Cooper*, 21 N. J. Eq. 595; *Ogle v. Dill*, 55 Ind. 130; *Johnson v. Rand*, 6 N. H. 22.

² *Powers v. Osgood*, 102 Mass. 457; *Ray v. Fletcher*, 12 Cush. 200; *Daniels v. Citizens' Savings Institution*, 127 Mass. 534.

³ *Crossley v. Lightowler*, L. R. 3 Ch. 478; L. R. 3 Eq. 279; *Wood v. Waud*, 3 Exch. 748; *Carlyon v. Lovering*, 1 H. & N. 784; *Moore v. Webb*, 1 C. B. n. s. 673; *Wright v. Williams*, 1 M. & W. 77; *Attorney General v. Halifax*, 39 L. J. Ch. 129; *Cater v.*

Lewisham, 11 Jur. (N. S.) 340; *Warren v. Hunter*, 1 Phila. 414.

⁴ *Murgatroyd v. Robinson*, 7 E. & B. 391.

⁵ *Crosby v. Bessey*, 49 Maine, 539. A grant of land for a tannery with the right to take water from the grantor's mill-pond, "for carrying away the spent bark," does not confer the right to discharge the bark into the stream, so that it will lodge upon the grantor's premises, or obstruct the flow of the water. *Winchester v. Osborne*, 61 N. Y. 555; reversing s. c. 62 Barb. 337.

⁶ *Cooper v. Barber*, 3 Taunt. 90; *Roundtree v. Brantley*, 34 Ala. 544.

commencement of the twenty years.¹ "It may be difficult," says Lord Chelmsford, L.C.,² "to fix a limit to such a right where the quantity of fouling to which the prescription extends has not been far exceeded, but where the excess is considerable the proof will be comparatively easy. The user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person."

§ 346. In order to establish such a right, there must be a perceptible amount of injury throughout the statutory period, and, if within that period, it appears, upon a bill for an injunction, that some degree of present nuisance exists, the court will take into account its probable continuance and increase.³ If a prescriptive right to pollute is proved, it is not sufficient for the plaintiff to show that the defendant uses in his mill materials different from those formerly employed, but he must show a greater amount of pollution and injury arising from the use of the new materials.⁴ If it has been the practice to throw only saw-dust into a stream, this does not establish the right of discharging into it poisonous and noxious drugs.⁵ A prescriptive right may also be acquired to go upon another's land for the purpose of cleansing a watercourse, or for purposes connected therewith, under a claim of right to the watercourse itself.⁶

§ 347. The general rule is that when an easement is created by grant or reservation, no use of it will be held to be adverse which substantially conforms to such grant or

¹ *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 3 Eq. 279; *Moore v. Webb*, 1 C. B. N. S. 673; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Jones v. Crow*, 32 Penn. St. 398; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 346.

² L. R. 2 Ch. 481.

³ *Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v.*

Leeds Corporation, L. R. 5 Ch. 583, 596; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Murgatroyd v. Robinson*, 7 El. & Bk. 391.

⁴ *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Luttrell's Case*, 4 Rep. 86.

⁵ *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 346.

⁶ *Peter v. Daniel*, 5 C. B. 568; *Beeston v. Weate*, 5 E. & B. 986.

reservation, and can be construed to be consistent with its terms.¹ When an express grant is made of the right to use the water for a particular purpose, the grantee may acquire a prescriptive right to use it for a different purpose.² In *Wheatley v. Chrisman*,³ the right was granted by an upper to a lower proprietor to divert water from a stream for the irrigation of meadows, and the grantee used the diverted water for more than twenty-five years for watering horses and cattle. The mining operations of the upper proprietor, rendering the water unfit for the latter purpose, were held to be an infringement upon the prescriptive right of the lower proprietor to apply the water to that use. The court said: "When an easement is granted for one purpose, and the grantee exercises the right mentioned in the deed, and another right also, he is not less secure against all interruption of either than he would have been if no express grant at all had been shown. It is as easy to presume another grant for watering horses, superadded to that for watering meadows, as it would have been, in the absence of any deed, to presume that there was a grant for both together. If one man has a right of way over another's field, which he has exercised without interruption for twenty-one years, it will scarcely be contended that his right could be destroyed by showing that he had a deed for a similar right of way over a different field. It is almost equally clear that if I grant a right to pass over my land on foot, and the grantee, instead of confining himself to that mode of passage, goes over it continually, for twenty-one years, with wagons and horses, a grant for the latter purpose ought to be presumed in addition to that of the footway."

§ 348. After the acquisition of an easement by prescription is complete, it may be lost by abandonment, when the facts or circumstances clearly indicate such an intention.⁴

¹ *Atkins v. Boardman*, 20 Pick. 291; 2 Met. 457; *Gayetty v. Bethune*, 14 Mass. 49; *Barber v. Nye*, 65 N. Y. 211, 221.

² *Olmsted v. Loomis*, 9 N. Y. 423.

³ 24 Penn. St. 298.

⁴ *Carlisle v. Cooper*, 19 N. J. Eq. 256; 21 N. J. Eq. 576; *Shields v. Arndt*, 3 Green Ch. 234; *Doe v. Hilder*, 2 B. & Ald. 791; *Jamaica Pond*

Non-user is one element in determining such intention, and if long continued, is presumptive evidence that the right is lost.¹ But a jury is not bound to infer an abandonment from non-user alone, though continued for more than twenty years.² If the non-user was merely for the convenience of the owner of the dominant tenement and those under whom he claims, and without any intention to abandon the right, such right still continues;³ and if the non-user is not accompanied by acts showing an intention to abandon, evidence of adverse possession, as well as non-user, is necessary to effect the extinguishment.⁴ In *Crossley v. Lightowler*,⁵ it was held that the actual disuse of a prescriptive right to foul a stream for twenty years, during which time others had acquired adverse rights, destroys the right of fouling. In *Chandler v. Jamaica Pond Aqueduct Corporation*,⁶ it was decided that the uninterrupted occupation of the land in question, for more than twenty years, under a claim of a title in fee, was an adverse use of the servient tenement, inconsistent with the existence of an easement established by grant, to raise a dam, and to check, impede, and use the water flowing through the land, and thus to flow it, and that the easement was extinguished. A misuse of an easement, however great the perversion, is not an abandonment;⁷

Aqueduct v. Chandler, 121 Mass. 3; *Parkins v. Dunham*, 3 Strob. 224.

¹ *Hillary v. Waller*, 12 Ves. 265; *Farrar v. Cooper*, 34 Maine, 394.

² *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 141; 21 N. J. Eq. 463; *Barnes v. Lloyd*, 112 Mass. 231; *Bannon v. Angier*, 2 Allen, 129; *Pratt v. Sweetser*, 68 Maine, 344; *Maguire v. Baker*, 57 Ga. 109; *Townsend v. McDonald*, 12 N. Y. 381; *Nitzell v. Paschall*, 3 Rawle, 76. A release of the original right will be inferred from non-user, though not extending over twenty years, when a way is substituted for a previous way with the consent of the person entitled. *Mulville v. Fallow*, Ir. R. 6 Eq. 458.

³ *Horner v. Stillwell*, 35 N. J. L. 307; *Ward v. Ward*, 7 Exch. 833.

⁴ *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 141; 21 N. J. Eq. 463; *Browne v. Trustees*, 37 Md. 119; *Wright v. Freeman*, 5 H. & J. 467, 477; *Harvie v. Rogers*, 3 Bligh, n. s. 440; *Pillsbury v. Moore*, 44 Maine, 154; *Cuthbert v. Lawton*, 3 McCord, 195; *Smyles v. Hastings*, 22 N. Y. 217.

⁵ L. R. 2 Ch. 478; L. R. 3 Eq. 277; *Ward v. Ward*, 7 Exch. 838; *Cook v. Bath*, L. R. 6 Eq. 178.

⁶ 125 Mass. 544; *Owen v. Field*, 102 Mass. 90; *Barnes v. Lloyd*, 112 Mass. 224; *Jennison v. Walker*, 11 Gray, 423; 3 Kent Com. 448; *Hoffman v. Savage*, 15 Mass. 130; *Beardslee v. French*, 7 Conn. 125.

⁷ *Locks & Canals v. Nashua & Lowell Railroad Co.*, 104 Mass. 8.

and an easement does not become merged or lost by the assertion of a claim which is inconsistent therewith, as by a disseisin or wrongful claim of title against the owner of the servient tenement.¹ After the extinguishment of an easement the purchaser of the dominant tenement has no remedy against one who, after such extinguishment, has purchased the servient tenement.²

§ 349. If the period of twenty years has not elapsed, the acts of the owner of one tenement, which are acquiesced in by the owner of the other, are often material on the question of abandonment, and may create an equitable estoppel.³ The creation by the parties of a new right, which is inconsistent with the nature or exercise of the servitude, however acquired, extinguishes the former right.⁴ If tenants in common make partition of lands theretofore flowed by a dam, and execute mutual releases, in each of which the grantor conveys all his "right, title, and interest" in the land, and agrees that neither the grantor, nor his heirs, nor any person claiming under him or them shall "claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof forever," the mill privilege is thereby voluntarily abandoned and extinguished.⁵ The owner of land flowed by a dam, who permits it to be several times rebuilt without opposition, and who encourages by his silence the expenditure of money and labor thereon, is deprived of the right to the interference of a court of equity to restrain the rebuilding of the dam.⁶

¹ *Ibid.*; *Tyler v. Hammond*, 11 Mowry v. Sheldon, 2 R. I. 369; *Mor-*
Pick, 193, 220; *White's Bank v. rill v. Mackman*, 24 Mich. 279.
Nichols, 64 N. Y. 65.

² *Ballard v. Butler*, 30 Maine, 94.

³ *Queen v. Charley*, 12 Q. B. 573;
Stokoe v. Singers, 3 El. & Bk. 31;
Davies v. Marshall, 10 C. B. N. S. 697;
Case of the watercourses, 2 Eq. Cas.
Alr. 522; *Johnson v. Hyde*, 33 N. J.
Eq. 643; *Carlisle v. Cooper*, 21 N. J.
Eq. 591; *Society v. Lehigh Valley*
Railroad Co., 32 N. J. Eq. 329; *Haight*
v. Proprietors, 4 Wash. C. C. 601;
Hazard v. Robinson, 3 Mason, 275;

⁴ *Taylor v. Hampton*, 4 McCord,
96; *Illinois Central Railroad Co. v.*
Allen, 39 Ill. 205.

⁵ *Hamilton v. Farrar*, 128 Mass.
492.

⁶ *Sheldon v. Rockwell*, 9 Wis. 167;
Thomas v. Woodman, 23 Kansas, 217;
Wilson v. Vaughn, 40 Iowa, 179; *Jac-*
cox v. Clark, Walk. Ch. 249. See
Fremont Ferry Co. v. Dodge County,
6 Neb. 18.

Where the plaintiff, being the owner of land overflowed by the defendant's dam, told the defendant, before the erection of the latter's dam and mill, that the stream had a sufficient fall, and that he had levelled it, and then stood by and without objection saw the mill and dam erected at great expense, an injunction was refused to enjoin the maintenance of the dam and to obtain its removal.¹

§ 350. In *Birmingham Canal Co. v. Lloyd*,² the plaintiffs, who had the use of certain reservoirs, were notified by the defendants, owning coal mines, that they intended to make a level on their mines, the effect of which would be to draw off the water in the reservoirs. After the defendants had commenced their work and expended about two thousand pounds, and nearly two years after the notice was given, the plaintiffs applied for an injunction. Lord Eldon said that the plaintiffs' opposition should have been made when they could have done so with justice, and that they must now take their chances at law. In *Farrar v. Cooper*,³ it was held that, although twenty years may not have elapsed from the time of ceasing to use a mill privilege, prior to its being overflowed and destroyed by a lower dam, yet an abandonment of the upper privilege may be presumed, if its owner, witnessing the erection of the lower dam and of expensive works in connection therewith, and knowing that it must destroy his privilege, makes no effort to prevent it, or claim for remuneration, within the residue of the twenty years. In *Corning v. Troy Iron Factory*,⁴ it was held that the owner of a water privilege who assents to the erection by another of expensive machinery for the diversion of water above him on the stream is not thereby estopped, upon afterwards purchasing the land on the stream opposite such machinery, from insisting upon the restoration of the water to its natural channel along the land so purchased. So, a license to overflow the plaintiff's land is not to be presumed from the fact that the plaintiff did not object to the building of

¹ *Wilson v. Vaughn*, 40 Iowa, 179.

² 18 Ves. 515.

³ 34 Maine, 394.

⁴ 40 N. Y. 191.

the dam, and gratuitously assisted in its erection, if he did not know and could not foresee the injury.¹ A land-owner who sees the erection of a dam, by which the water will be flowed back to his injury, is not bound to give notice to the owner of the dam if the latter knows his rights or has means of knowing them, and obstinately proceeds with the work.² The acceptance, within twenty years, of a deed which grants a mill-site, and recites the existence of another mill-site above it, but does not show that the upper site had a prior right in the use of the water, does not estop the grantee from asserting the abandonment of the upper site by non-user.³

§ 351. When an easement is once established by grant, or by prescription which presupposes a grant, it cannot be extinguished by a parol agreement,⁴ at least, if such agreement is unexecuted.⁵ In the case of an express grant, the same period of time and the same acts of enjoyment are necessary for the acquisition of rights, adverse to the existence of the easement, that are required in order to establish an easement by prescription.⁶ It would seem that a title acquired by prescription is as strong as a title acquired by grant, and that, where no element of estoppel enters into the

¹ *Bell v. Elliott*, 5 Blackf. 113.

² *Hepburn v. McDowell*, 17 S. & R. 383; *Brown v. Spalding*, 1 Pitts. 361.

³ *Farrar v. Cooper*, 34 Maine, 394.

⁴ *Pue v. Pue*, 4 Md. Ch. Dec. 386; *Dyer v. Sanford*, 9 Met. 395; *Bronson v. Coffin*, 108 Mass. 186.

⁵ *Dyer v. Sanford*, 9 Met. 395; *Pope v. Devereux*, 5 Gray, 412; *Morse v. Copeland*, 2 Gray, 304; *Curtis v. Noonan*, 10 Allen, 409; *Wallis v. Harrison*, 4 M. & W. 538; *Bannon v. Angier*, 2 Allen, 128.

⁶ *Veghte v. Raritan Canal Co.*, 19 N. J. Eq. 142; 21 N. J. Eq. 463; *Hayford v. Spokesfield*, 100 Mass. 491; *Owen v. Field*, 102 Mass. 90, 114; *Arnold v. Stevens*, 24 Pick. 106; *Knapp v. Douglass Axe Co.*, 13 Allen, 1; *White v. Crawford*, 10 Mass. 183; *Smyles v. Hastings*, 22

N. Y. 217; *Casler v. Shipman*, 35 N. Y. 542; *Jewett v. Jewett*, 16 Barb. 150; *Townsend v. McDonald*, 12 N. Y. 381; *Doe v. Butler*, 3 Wend. 149; *Maguire v. Baker*, 57 Ga. 109; *Nitzell v. Paschall*, 3 Rawle, 76; *Butz v. Ihrle*, 1 Rawle, 218; *Teakle v. Nace*, 2 Whart. 123; *Noll v. Dubuque Railroad*, 32 Iowa, 66. An easement created by grant does not become extinguished merely because the necessity for its use has ceased. *Atlanta Mills v. Mason*, 120 Mass. 244. But an easement, created by grant, to take water from one tenement to be used for the running of a mill situated on another, and appurtenant to the mill only, and not to any parcel of land, is lost if the mill is destroyed and not rebuilt. *Day v. Walden*, 46 Mich. 575.

case, such as witnessing without objection the erection of a dam and expensive works upon the stream,¹ the prescriptive right would not be abandoned without a non-user for twenty years,² although according to the decisions in England and in several States, the intention is the material consideration in determining whether there has been an abandonment, and a cesser of use for a less period than twenty years, accompanied by acts clearly indicative of the intent to abandon the prescriptive right, is sufficient.³ This doctrine, if correct, would not apply to the abandonment of an easement within the twenty years during which the right thereto is accruing.⁴

§ 352. The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it is of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, presumably of a temporary character, and liable to variation. The flow of water for twenty years from the eaves of a house could not give a right to the neighbor to insist that the house shall not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. So, the flow of water from a drain for twenty years, for the purposes of agricultural improvements, would not enable the neighbor to preclude the proprietor from altering the level of his drains for the greater improvement of the land.

¹ *Stokoe v. Singers*, 8 El. & Bk. 31; 584; *Bowen v. Team*, 6 Rich. (S. C.) Farrar v. Cooper, 34 Maine, 394; 305.

Taylor v. Hampton, 4 McCord, 96.

² *Bower v. Hill*, 1 Bing. (N. C.) 549; *Moore v. Rawson*, 3 B. & C. 332; 5 *Johnston v. Hyde*, 33 N. J. Eq. 643; *Dowl. & Ryl.* 234; *Liggins v. Inge*, 7 *Curtis v. Jackson*, 13 Mass. 507; *Jennison v. Walker*, 11 Gray, 423; *Hurd v. Curtis*, 7 Met. 94; *Williams v. Nelson*, 23 Pick. 141; *Day v. Walden*, 46 Mich. 575; *Corning v. Gould*, 16 *Mississippi Central Railroad Co. v. Mason*, 51 Miss. 234.

³ *Ibid.*; *Dana v. Valentine*, 5 Met. 8; *Cuthbert v. Lawton*, 3 McCord, 195.

In such cases, the circumstances show that one party never intended to give, nor the other to enjoy, the use of the water as matter of right.¹

§ 353. In Massachusetts it is held that the unexplained enjoyment for twenty years, and without any claim or payment of damages, of the statutory right to flow another person's land by means of a mill-dam, is evidence of a right to flow without such payment, and bars a claim for damages.² But in Maine, actual damage to the land-owner must be shown in order to give rise to the presumption of a grant or license of the right to flow, or to bar proceedings under the statute.³

§ 354. The general rules relating to severance of tenements are that a grant by the owner of a tenement of part of that tenement, as it is then used and enjoyed, passes to the grantee by implication, and without use of the word "appurtenances" or similar words, all those easements which the grantor can convey, which are necessary to the reasonable enjoyment of the granted property, and have been, and are, at the time of the grant, used by the owners of the entirety for the benefit of the granted tenement; and that, except in the case of ways or easements of necessity,⁴ there is no corresponding implication in favor of the grantor, who if he wishes to reserve any right over the granted part, should reserve it expressly in the grant.⁵ If, therefore, the owner

¹ *Wood v. Waud*, 3 Exch. 777; *Greatrex v. Hayward*, 8 Exch. 291; *Rawstron v. Taylor*, 11 Exch. 380; *Broadbent v. Ramsbotham*, Id. 602.

² *Williams v. Nelson*, 23 Pick. 141.

³ *Nelson v. Butterfield*, 21 Maine, 220; *Underwood v. North Wayne Scythe Co.*, 41 Maine, 291; *Gleason v. Tuttle*, 46 Maine, 288; *Tinkham v. Arnold*, 3 Greenl. 120; *Seidensparger v. Spear*, 17 Maine, 123.

⁴ See *Pearson v. Spencer*, 3 B. & S. 761; *Pettingill v. Porter*, 8 Allen, 1; *Morrison v. Marquardt*, 24 Iowa, 35.

⁵ *Wheeldon v. Burrows*, 12 Ch. D. 31; *Tenant v. Goldwin*, 2 Ld. Raym.

1089, 1093; *Hinchcliffe v. Kinnoul*, 5 Bing. N. C. 1; *Barnes v. Loach*, 4 Q. B. D. 494; *Wardle v. Brocklehurst*, 1 El. & El. 1058; *Palmer v. Fletcher*, 1 Lev. 122; *Swansborough v. Coventry*, 9 Bing. 305; *Cox v. Mathews*, 1 Vent. 237; *Compton v. Richards*, 1 Price, 27; *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen, 164; *Spaulding v. Abbott*, 55 N. H. 423; *Tourtellot v. Phelps*, 4 Gray, 378; *Michell v. Seipel*, 53 Md. 251; *Oakley v. Stanley*, 5 Wend. 523; *Elliot v. Rhett*, 5 Rich. (S. C.) 405; *Hammond v. Woodman*, 41 Maine, 177.

of land conveys away a portion of his premises, a part of which is, at the time of the conveyance, flowed by a mill-dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an implied reservation; but if he sells and conveys the mill, the right to flow the land passes as an incident to the purchaser, and cannot be cut off by the grantor.¹ So, the grant of a dam on another's soil entitles the grantee to enter for the purpose of repairing the dam.² It is, however, a matter of contract depending entirely upon the construction of the conveyance, and the above rules are applicable according to the character, state, and use of the premises at the time of the grant, only where the intention of the parties in this respect is not expressed in terms.³

§ 355. A grant will be implied especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and waterpipes or spouts, all these being continuous easements technically so called, that is, easements which are enjoyed without any active intervention of the party entitled to enjoy them; but ways are not in this sense continuous easements, being enjoyed only as they are travelled. The application of the doctrine to ways has been quite uniformly denied,⁴ although there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another, will, upon a severance of the estate, pass as implied or constructive ease-

¹ *Burr v. Mills*, 21 Wend. 290; *United States v. Appleton*, 1 Sumner, 492. But see *Dunklee v. Wilton Railroad Co.*, 24 N. H. 489.

² *Frailey v. Waters*, 7 Penn. St. 221; *Skull v. Glenister*, 11 W. R. 368; *Phear's Rights of Water*, 72-74.

³ *Hall v. Lund*, 1 H. & C. 676; *Johnson v. Jordan*, 2 Met. 234, 239.

⁴ *Pheysey v. Vicary*, 16 M. & W. 484; *Whalley v. Thompson*, 1 B. & P. 371; *Worthington v. Grimson*, 2 El. & El. 618; *Dodd v. Burchell*, 1

H. & C. 113; *Polden v. Bastard*, 4 B. & S. 258; L. R. 1 Q. B. 155; *Barlout v. Rhodes*, 1 C. & M. 448; *Thompson v. Waterlow*, L. R. 6 Eq. 36; *Langley v. Hammond*, L. R. 3 Ex. 161; *Daniel v. Anderson*, 31 L. J. N. S. 610; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *O'Rorke v. Smith*, 11 R. I. 259; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Evans v. Dana*, 7 R. I. 306; *Kenyon v. Nichols*, 1 R. I. 411; *Lampman v. Milks*, 21 N. Y. 505.

ments appurtenant to the part of the estate for the benefit of which they were established.¹ Whether the estate sold be the servient or dominant tenement, the easement, or other incident of property, in order to pass by implication, must be open, apparent, and continuous.² The right to go to a well and there take water is not a continuous easement nor is it an easement of necessity.³

§ 356. In *Nicholas v. Chamberlain*,⁴ it was held upon demurrer, "that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. But by Popham, *Chief Justice*, if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after the lease determines; he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it; because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is if a disseisor of an house and land erect such a conduit, and

¹ *Kieffer v. Imhoff*, 26 Penn. St. 438; *McCarty v. Kitchenman*, 47 Penn. St. 239; *Cannon v. Boyd*, 73 Penn. St. 179; *Thompson v. Miner*, 30 Iowa, 386; *Huttemeier v. Albro*, 18 N. Y. 48; 2 Bosw. 546.

² *Kutz v. McCune*, 22 Wis. 628; *Scott v. Bentel*, 23 Gratt. 1; *Hardy v. McCullough*, Id. 251.

³ *Polden v. Bastard*, L. R. 1 Q. B. 156, 161.

⁴ *Cro. Jac.* 121; *Palmer v. Fletcher*, 1 Lev. 122; *Sury v. Pigott*, *Palmer*, 444; 3 Bulst. 339; *Poph.* 166.

the disseisee re-enter, not taking conusance of any such erection nor using it, but presently after his re-entry sells the house to one, and the land to another; he who hath the land is not compellable to suffer the other to enjoy the conduit." This decision appears never to have been questioned, and is recognized as authority in numerous decisions.¹

§ 357. With respect to the rights of the vendor upon the severance of tenements, the decision in *Pyer v. Carter*² has given rise to much discussion, and has been approved in certain cases in England and in this country.³ In that case

¹ *Suffield v. Brown*, 33 L. J. (N. S.) Ch. 249; *Pyer v. Carter*, 1 H. & N. 916; *Robins v. Barnes*, Hobart, 131; *United States v. Appleton*, 1 Sumner, 492; *Hazard v. Robinson*, 3 Mason, 272; *Philbrick v. Ewing*, 97 Mass. 133; *Coolidge v. Hagar*, 43 Vt. 9, 14; *Lampman v. Milks*, 21 N. Y. 505; *Burr v. Mills*, 21 Wend. 290; *Ogden v. Jennings*, 62 N. Y. 526, 531; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Shaw v. Etheridge*, 3 Jones (N. C.) 300; *Elliott v. Sallee*, 14 Ohio St. 10; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Pickering v. Stapler*, 5 S. & R. 107; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Elliott v. Sallee*, 14 Ohio St. 10.

² 1 H. & N. 916; *Ewart v. Cochrane*, 4 Macq. 117; *Hall v. Lund*, 3 B. & S. 761; 1 H. & C. 676; *Pearson v. Spencer*, 3 B. & S. 762; *Chadwick v. Marsden*, L. R. 2 Ex. 289.

³ *Ibid.*; *Ewart v. Cochrane*, 4 Macq. 117; *Watts v. Kelson*, L. R. 6 Ch. 166; *Worthington v. Gimson*, 2 El. & El. 618; *Dillman v. Hoffman*, 38 Wis. 559; *Seibert v. Levan*, 8 Penn. St. 383; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 263; 19 N. J. Eq. 471; *Janes v. Jenkins*, 34 Md. 1. In *Wheeldon v. Burrows*, 12 Ch. D. 31, 48, 52, 59, Thesiger, L. J., while dissenting from the broad doctrine laid down in *Pyer v. Carter*, said: "That was a case of a somewhat special character. A house was conveyed to the defendant by a person who was the owner of that

house, and also of the house which was subsequently conveyed to the plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the defendant's premises over the plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water, when it came on to what were subsequently the plaintiff's premises, was conveyed into a drain on the plaintiff's premises, which drain passed through the defendant's premises, and in that way went out into the common sewer. Subsequently, the house over which this easement existed was conveyed to the plaintiff, and upon an obstruction of the drains in the defendant's house, which, be it observed, immediately caused a flooding of the plaintiff's house by the very water coming from the defendant's house, the plaintiff brought his action, and it was held there that the plaintiff was entitled to maintain his action, and that upon the original conveyance to the defendant, there was a reservation to the grantor of the right to carry away this water which came from the defendant's premises by the medium of the drain which also went through his premises. Though these circumstances were special in their character, there is no doubt that the principles laid down by the Court of

the action was for stopping a drain discharging into a common sewer and running through the adjoining premises of the plaintiff and the defendant, which had formerly been one estate and were converted into two by a former owner after the construction of the drain. It appeared that the plaintiff might have made a drain directly from his house into the sewer at a trifling expense, and the defendant testified that he did not know of the existence of the drain at the time of the conveyance to him. Judgment was for the plaintiff, and Watson, B., said: "We think that the owners of the plaintiff's house are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in towns would be very great." "It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him, but it is clear that he must have known or ought to have known that some drainage then existed,

Exchequer were as wide as possibly could be. That Court laid down that there was no distinction between implied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject." "I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant, under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal

and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right comes for discussion, to consider that point."

and if he had inquired he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. Gale that by '*apparent signs*' must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase."

§ 358. In the subsequent case of *Suffield v. Brown*,¹ the owner of a dock and an adjoining wharf conveyed the wharf without reservation, and it was held that no reservation of an easement was implied, in favor of the vendor, and for the perfect enjoyment of the dock, to have the bowsprits of vessels project over the wharf. Lord Westbury, L. C., said: "I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor." Of *Pyer v. Carter*, his lordship said: "I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority." The doctrine of *Pyer v. Carter* has also been disapproved in other cases in England,² and in Massachusetts,³ Maine,⁴ and Maryland.⁵

§ 359. In *Johnson v. Jordan*,⁶ in Massachusetts, the owner of two adjoining lots, one occupied by himself and the other leased by him, constructed a drain leading into a common sewer from the leased premises through those which

¹ 4 De Gex, J. & S. 185; 10 Jur. N. Q. B. 156, 160; *White v. Bass*, 7 H. & S. 111; 6 Jur. N. S. 999; *Morland v.* N. 722.

Cook, L. R. 6 Eq. 252.

³ *Carbrey v. Willis*, 7 Allen, 364,

² *Dodd v. Burchell*, 1 H. & C. 113; 369; *Randall v. McLaughlin*, 10 Allen, 366; 6 Allen, 201.

Crossley v. Lightowler, L. R. 2 Ch. 478, 486; *Wheeldon v. Burrows*, 12

⁴ *Warren v. Blake*, 54 Maine, 276.

Ch. D. 31; *Polden v. Bastard*, L. R. 1

⁵ *Mitchell v. Seipel*, 53 Md. 251.

⁶ 2 Met. 234.

he occupied, and permitted his tenants to use it for about ten years. He then sold both lots by simultaneous conveyances¹ to different purchasers, and did not refer to the drain in the deed of the premises which he had previously leased. This deed was held to pass no right to the use of the drain through the other lot, if, by reasonable labor and expense, the grantee could make a drain without going through that land. In delivering the opinion of the court, Shaw, C. J., distinguished an artificial gutter, made for the purpose of drainage, from a natural watercourse, of which each adjoining proprietor has a natural right to the benefit, as it passes through his land, not as an easement or appurtenance, but as parcel, for all useful purposes to which it may be applied,² and from those cases wherein the declivity of the land and the relative position of the tenements are such that a drain cannot be formed with reasonable labor and expense for the benefit of one without passing through the other. The learned judge said: "If a man, owning two tenements, has built a house on one, and annexed thereto a drain passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee: Whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that, as the right of drainage was not reserved in terms, when it naturally would be if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance." As the conveyances from the owner of the whole estate under which the parties claimed were simultaneous, the case was considered to be more like a partition between tenants in common, where each party takes his estate with the rights, privileges, and in-

¹ See, also, *Kilgour v. Ashcom*, 5 H. & J. 82; *Elliott v. Sallee*, 14 Ohio St. 10.

² *Sury v. Pigott*, Palmer, 444; 3 Bulst. 339; *ante*, c. 7.

cidents inherently attached to it than the case of grantor and grantee, where the grantor conveys a part of his land by metes and bounds, and retains another part to his own use, and where the question is, upon the terms of the deed, whether an easement for drainage was granted with the estate conveyed over that retained, or reserved over that conveyed for the benefit of that retained.

§ 360. In *Carbrey v. Willis*,¹ in the same State, it was held that, where the grant of the lower estate precedes that of the other, no easement can be taken as reserved by implication, unless it is *de facto* annexed and in use at the time of the grant, and is necessary to the enjoyment of the estate which the grantor retains, such necessity not being deemed to exist, if a similar privilege can be secured by reasonable trouble and expense; and that where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty against incumbrances, there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. In *Roberts v. Roberts*,² in New York, it was held that, if a land-owner changes the course of a stream running through his land by cutting an artificial ditch to carry off its waters, the change in the condition of the land being permanent and visible, and afterwards conveys to different grantees the respective portions of the land on which are the old and new channels, the one grantee holds his portion relieved from the stream and the other burdened with it. In other cases, in this State, it is held that the presumption that the parties contract with reference to the visible physical condition of the property at the time of the conveyance, may be rebutted by proof that there is no apparent sign of the servitude indicating its existence to a person reasonably familiar with the subject

¹ 7 Allen, 364; *Collier v. Pierce*, 7 Gray, 18; *Hapgood v. Brown*, 102 Mass. 453; *Pettingill v. Porter*, 8 Allen, 1; *Thayer v. Payne*, 2 Cush. 327; *Warren v. Blake*, 64 Maine, 276; *Dolliff v. Boston & Maine Railroad*, 68 Maine, 173; *Parker v. Bennett*, 11 Allen, 388.
² 55 N. Y. 275; *Lampman v. Milks*, 21 N. Y. 505; *Dunklee v. Wilton Railroad*, 24 N. H. 489.

upon an inspection of the premises, or by proof of actual knowledge on the part of the parties of facts which negative any deduction to be drawn from the apparent condition.¹

§ 361. The decision in *Seymour v. Lewis*,² in New Jersey, inclines more strongly to support the doctrine of the French law. It was there held that when the owner of two tenements sells one of them, the purchaser takes his tenement with all the burdens as well as benefits, as between it and the property which the grantor retains, which appear at the time of the sale to belong to it; and that, upon the facts of the case, the privilege of diverting water, by means of conduits and pipes, from a spring in one parcel of land to a mill upon other land belonging to the same owner, was reserved by implication to the grantor, under his grant of the first parcel by metes and bounds, without reservation of or reference to the easement.

§ 362. No implication of a grant of an easement arises from proof that the land granted could not be conveniently occupied without it. Its foundation rests in a necessity for it, not in convenience.³ In *New Ipswich Factory v. Batchelder*,⁴ a tract of land was conveyed, described by metes and bounds, with a mill upon the same. At the time of the conveyance, a raceway to conduct the water from the mill ran along the side of the natural stream, beyond the land granted, into other land of the grantor, and then discharged the water into the natural stream. This raceway had been used with the mill for several years, and was necessary for

¹ *Butterworth v. Crawford*, 46 N. Y. 349; *Simmons v. Cloonan*, 47 N. Y. 3; *Curtis v. Ayrault*, 47 N. Y. 73. See *Wardle v. Brocklehurst*, 1 El. & El. 1058; *Shaw v. Etheridge*, 3 Jones (N. C.) 300.

² 13 N. J. Eq. 439; *Denton v. Leddell*, 23 N. J. Eq. 64; 24 N. J. Eq. 567; *Fetters v. Humphreys*, 18 N. J. Eq. 260; 19 N. J. Eq. 471.

³ *Dodd v. Burchell*, 1 H. & C. 113, 122; *Pearson v. Spencer*, 3 B. & S.

761; *Nichols v. Luce*, 24 Pick. 102; *Gayetty v. Bethume*, 14 Mass. 49; *Thayer v. Payne*, 2 Cush. 327; *Carbrey v. Willis*, 7 Allen, 364, 369; *Leonard v. Leonard*, 2 Allen, 543; *Trask v. Patterson*, 29 Maine, 499, 503; *Howell v. McCoy*, 3 Rawle, 256; *Smyles v. Hastings*, 22 N. Y. 217; *Brakely v. Sharp*, 9 N. J. Eq. 9; 10 N. J. Eq. 206; *McTairsh v. Carroll*, 7 Md. 352.

⁴ 3 N. H. 190.

the convenient working of the mill. It was held that the right to have the water flow off through the whole extent of the raceway passed as appurtenant to the mill. A right of way by necessity does not depend upon the existence of such right prior to the conveyance of the land, but it has never been held that the grantee has any right, on the ground of necessity, to construct a new drain through his grantor's land.¹

¹ *Russell v. Jackson*, 2 Pick. 578; *lins v. Prentice*, 15 Conn. 39; *Pierce v. Hart v. Cramer*, 25 Conn. 331; *Col- Selleck*, 18 Conn. 321.

CHAPTER XII.

REMEDIES AT LAW.

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- 423, 424. Ibid. — Continuing trespasses.
- 425-431. Venue and jurisdiction. — Private actions.
- 432-443. Ibid. — Of indictments.
444. Ibid. — The rule in equity.
- 445, 446. Ibid. — Jurisdiction exercised by the Federal courts.
- 447-461. Other remedies at law. — On covenants.
- 462-468. Ibid. — Particular covenants.
- 469, 470. Ibid. — Assumpsit.
471. Ibid. — Ejectment.
- 472-474. Ibid. — Mandamus.
- 475-480. Pleading. — The declaration.
- 481-487. Ibid. — Allegation and proof of breach.
- 488-491. Ibid. — Defences and pleas.
- 492-503. Evidence.
- 504, 505. Former judgment.

§ 363. A person specially injured by a nuisance may lawfully enter upon the premises of another who maintains it, for the purpose of abating it, or of removing the obstruction which is the cause of the injury, when this can be done without a breach of the peace.¹ This right appears to exist in favor of a lessee, or any other person lawfully in possession, as well as the owner in fee.² Under this rule a dam which causes the water to flow back to an unreasonable extent may be removed, so far as necessary, by an upper proprietor whose land is thereby flowed without his license;³ an obstruction to the free flow of the water to or from a mill may be re-

¹ *Batten's Case*, 9 Rep. 54 *b*; *Raikes v. Townsend*, 2 Smith, 9; *Baldwin v. Smith*, 82 Ill. 162; *Day v. Day*, 4 Md. 262; *Hamilton v. White*, 5 N. Y. 9; *ante*, § 128.

² *Great Falls Co. v. Worster*, 15 N. H. 435, 436.

³ *Heath v. Williams*, 25 Maine, 209;

Brown v. Chadbourne, 31 Maine, 26; *Hodges v. Raymond*, 9 Mass. 316; *Jewell v. Gardiner*, 12 Mass. 311; *Colburn v. Richards*, 13 Mass. 420; *Knoll v. Light*, 76 Penn. St. 268; *Overton v. Sawyer*, 1 Jones (N. C.) 308; *Brisbane v. O'Neill*, 3 Strob. 348.

moved; ¹ an artificial channel, through which the water is unlawfully diverted, may be filled up; ² or if the stream is so polluted as to be injurious to the working of a mill, or the health of the community, a person thereby injured may abate the source of the corruption. If a natural stream is made foul by impurities cast therein, the source from which the impurities originate may be removed, but the stream itself cannot be lawfully destroyed or filled up; ³ and if a sewer is made by a municipal corporation, under competent authority, but in such an unskilful manner as to cause injury to private property, the owner may maintain an action against the city, but cannot remedy the injury by filling up the sewer. ⁴ But if commissioners of highways, or road surveyors, change the course of a stream to the injury of a riparian proprietor, he may make such reasonable abatement as may be necessary to secure his rights. ⁵ So if a town fails to keep in repair a culvert in a highway crossing a stream, whereby lands above are flooded, the land-owners may, after due notice, open the culvert in a proper manner, doing no unnecessary damage. ⁶

§ 364. No one can rightfully abate either a public or private nuisance who could not maintain an action for damages caused thereby; ⁷ but the abatement of the nuisance does not preclude a person entitled to maintain an action from recovering the damages sustained by him before the nuisance was removed. ⁸ And in an action to recover damages for the nui-

¹ *Prescott v. Williams*, 5 Met. 429; *Colburn v. Richards*, 13 Mass. 420. If A. erects a dam on B.'s land without license, B. may cause it to be removed as a nuisance, but cannot compel A. to maintain any portion of it. A. may permit the dam to fall to decay, or the water to run to waste, and will not thereby subject himself to any liability to B. *Bradford v. Cressey*, 45 Maine, 9.

² *Hodges v. Raymond*, 9 Mass. 319; *Lee v. Stevenson*, 27 L. J. Q. B. 263.

³ *Finley v. Hershey*, 41 Iowa, 394; *Miller v. Burch*, 32 Texas, 208; *Bloomer v. Morss*, 68 N. Y. 623.

⁴ *McGregor v. Boyle*, 34 Iowa, 268.

⁵ *McCord v. High*, 24 Iowa, 336; *Thompson v. Allen*, 7 Lans. 450. A county is not liable for the acts of the county court in causing a mill race which crosses a road to be filled up. *Reardon v. St. Louis Co.*, 36 Mo. 279; *Swineford v. Franklin Co.*, 73 Mo. 279.

⁶ *Groton v. Haines*, 36 N. H. 388.

⁷ *Ante*, § 128.

⁸ *Kendrick v. Bartland*, 2 Mod. 253; *Call v. Buttrick*, 4 Cush. 345; *Tate v. Parrish*, 7 Mon. (Ky.) 325; *Gleason v. Gary*, 4 Conn. 418; *Pilcher v. Hart*, 1 Humph. 524.

sance, it is no ground for mitigation of damages that the plaintiff might have abated the nuisance but did not.¹ The right to recover nominal damages caused by the nuisance is sufficient to justify an entry for the purpose of abating it.² In general, an erection cannot be abated as a nuisance unless it be such at the time; but it may be a nuisance at a time when it is not causing actual damage.³ The right of abatement must be exercised in the manner least injurious to the rights of others, and can be justified only against the wrong-doer. Thus, in the case of a nuisance by diversion, there is no right to enter upon the lands of those not parties to the wrong, for the purpose of regaining the use of the diverted water.⁴ If there are two ways of abating the nuisance, the least mischievous of the two must be chosen, and if by one of these alternative methods wrong would be done to innocent third parties, or to the public, that method cannot be justified at all as against them, and it may become necessary to abate the nuisance in a manner more onerous to the wrong-doer.⁵

§ 365. The abatement may be made, although greater damage results to the wrong-doer than the loss of that which causes the nuisance. Thus, if the owner of land upon one side of a stream builds a dam across the stream, the opposite proprietor may remove that part of the dam which is upon his land, even though the rest of the structure is thereby so weakened as to cause its destruction.⁶ So, if a person who has a prescriptive right to discharge clean water through another's drain, sends down foul water so that the nuisance

¹ *White v. Chapin*, 102 Mass. 133; *Wolf v. St. Louis Co.*, 15 Cal. 319.

² *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53, 56; *Adams v. Barney*, 25 Vt. 231; *Fish v. Dodge*, 4 Denio, 311.

³ *Fay v. Prentice*, 1 C. B. 828; *Rex v. Wharton*, 12 Mod. 510; *Norris v. Baker*, 1 Roll. 393, pl. 15; *Beach v. Trudgain*, 2 Gratt. 219; *Strong v. Benedict*, 5 Conn. 210, 222; *Tuthill v. Scott*, 43 Vt. 525.

⁴ *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

⁵ *Roberts v. Rose*, L. R. 1 Ex. 82.

⁶ *Wigford v. Gill*, Cro. Eliz. 269; *Adams v. Barney*, 25 Vt. 225; *Richardson v. Emerson*, 3 Wis. 319; *Marsh v. Brooks*, 2 Hill (S. C.) 42; *Biedelman v. Foulk*, 5 Watts, 308; *Lindeman v. Lindsey*, 69 Penn. St. 93; *Woolrych on Waters*, 225.

cannot be abated without interfering with the enjoyment, the whole drain may be stopped.¹ But no greater injury can be done than is strictly necessary to make the abatement effectual;² and the right to abate an unlawful structure does not justify the removal of anything connected therewith which is rightful.³ The person injured cannot convert to his own use the materials of the structure which causes the nuisance,⁴ and if his land is overflowed by the dam of a lower proprietor, which is of an unauthorized height, he may enter upon the land and lower the level of the dam, but is not justified in removing it altogether,⁵ or in diverting the water, to the injury of the lower proprietor, by cutting a ditch upon his own land.⁶ He has not even the right to take such measures as will relieve his land in the most speedy manner, if unnecessary injury will thereby be caused to the wrong-doer.⁷ If a dam erected in a public river interferes with the navigation, and is a public nuisance, a lower proprietor, if specially aggrieved, may interfere by abating the nuisance, but this would afford no justification for the erection of a dam upon his own land, and thereby flooding the dam above, and the wrong-doer's land with it.⁸

§ 366. A riparian proprietor is under no obligation to cleanse the stream, or to remove any obstructions that may arise without fault on his part.⁹ But each proprietor has a natural easement in the land below for the passage of the

¹ *Cawkwell v. Russell*, 26 L. J. Ex. 314; *Hill v. Cock*, 26 L. T. N. S. 185.

² *Prescott v. Williams*, 21 Pick. 241; *White v. Chapin*, 12 Allen, 521; *Veazie v. Dwinel*, 50 Maine, 479, 496; *Great Falls Co. v. Worster*, 15 N. H. 439; *Groton v. Haines*, 36 N. H. 388; *Gates v. Blencoe*, 2 Dana, 158; *Moffett v. Brewer*, 1 G. Greene, 348.

³ *Greenslade v. Halliday*, 6 Bing. 379; *Great Falls Co. v. Worster*, 15 N. H. 439.

⁴ *Larson v. Furlong*, 50 Wis. 681; *State v. Taylor*, 27 N. J. L. 117.

⁵ *Wright v. Moore*, 38 Ala. 593;

Heath v. Williams, 25 Maine, 209; *Dyer v. Dupui*, 5 Wharton, 584.

⁶ *Wright v. Moore*, 38 Ala. 593. A person who attempts unlawfully to abate a sluiceway to a mill, is liable not only for the materials destroyed, but for damages sustained by the owner of the sluiceway in being deprived of its use. *Hammett v. Russ*, 16 Maine, 171.

⁷ *Great Falls Co. v. Worster*, 15 N. H. 412, 439.

⁸ *Odiorne v. Lyford*, 9 N. H. 502; *ante*, § 121.

⁹ *Taylor v. Whitehead*, 2 Dougl.

water in the natural channel of the stream away from his land, and may enter upon the land of a lower proprietor for the purpose of clearing the channel from obstructions to the flow of the water.¹ This privilege arises from the necessity of the case, and like a way of necessity, or the right to abate a private nuisance, is to be exercised only when the party has no other reasonable and suitable mode of effecting the object, and in such a manner as to cause no unnecessary damage to the owner of the land below.²

§ 367. A similar rule applies where the owner of a mill has acquired by grant, or has immemorially enjoyed, the right of conducting off the water necessary to the working of the mill through an artificial canal or raceway constructed on another's land.³ The right thus acquired carries with it the right to do all necessary and proper acts to keep the raceway in a condition fit for the purposes for which it was intended. "It carries," says Shaw, C. J.,⁴ "an implied authority and license to enter upon the land to examine and clear the canal in a reasonable and proper manner, and of what is reasonable the usual and customary mode is good evidence. As to placing the materials taken from the bed of the stream on the adjoining bank, the right and the duty to do so may depend upon circumstances. If the canal is walled up, and the stones have fallen in, it would seem to be the right and the duty of the mill-owner, in removing the stones from the bed of the raceway, to replace them on the wall of the ditch. If the material be soil, which has fallen from the adjoining bank, and which may be useful or beneficial to the owner of

745; *Pomfret v. Ricroft*, 1 W. Saund. 321; *Bell v. Twentyman*, 1 Q. B. 766; *Bower v. Hill*, 1 Bing. (N. C.) 549; *McSwiney v. Haynes*, 4 Ir. Eq. 322; *Prescott v. Williams*, 5 Met. 429. A person who is required to construct an artificial vent for water, to prevent its overflowing another's land, is bound to keep it in repair. *Brisbane v. O'Neill*, 3 Strob. (S. C.) 348.

¹ *Ibid.*; *Pico v. Colimas*, 32 Cal. 578;

Darlington v. Painter, 7 Penn. St. 473; *Chapman v. Thames Manuf. Co.*, 13 Conn. 269; *ante*, § 362.

² *Ibid.*

³ *Prescott v. White*, 21 Pick. 341; *White v. Chapin*, 12 Allen, 516, 522.

⁴ *Prescott v. White*, 21 Pick. 341, 343. So of a right to repair pipes and to put a spring in order. *Legg v. Horn*, 45 Conn. 409.

the land, for the purpose of enriching the soil or otherwise, it would be the duty of the mill-owner to place it on the bank for his use. But if it be material not useful or beneficial, it would be the duty of the mill-owner to remove it off the land in a reasonable time, and in a manner least prejudicial to the owner of the land. We consider that this rule would not apply to a case where the mill-owner owns the land upon either side of the mill-race; there he may make use of his own land, and no grant from the owner will be presumed, being not necessary to the use of his mill. Nor will it apply to a case where the rights of the parties in this regard are regulated by any express grant or contract. Nor will it apply to cases where another and different mode of keeping such raceway clear of obstruction has for a long time been used and practised. We consider the incidental right of entering to keep the race clear of obstructions, where it passes another's land, to arise from the principle of presumed grant, and the terms, limitations, and extent of such grant must be determined from the obvious purposes for which the easement is designed, and to which it is adapted, and upon the manner in which it has been in fact used in past time, if any such use has been shown. But we do not consider it necessary for the defendant to show actual previous entries and clearings to establish the right, because no such clearing may have been necessary within time of memory. But in the absence of such instances of actual entry and clearing, the obvious necessity and fitness of doing so, in order to enjoy the principal right granted, must be proved, from which a grant of the incidental privilege may be inferred."

§ 368. The original private remedies at law for injuries done to or by means of waters were the old assize of novel disseisin, the writs of *quod permittat prosternere* and *praecipe quod reddat*, the assize of nuisance, and the actions of trespass and trespass on the case. The assize of novel disseisin lay for obstructing a right to convey water through land,¹ and probably was the original remedy for nuisances. The

¹ Bracton, bk. 4, cc. 42, 43, pp. 231, 232. See Vin. Abr. Nuisance, 27 (II.).

quod permittat prosternere was a writ in the nature of a writ of right, commanding the defendant to permit the plaintiff to abate the nuisance, and, in case of his refusal, summoning him to appear in court and show cause therefor. The plaintiff, if successful, had judgment of abatement, and for damages. The writ was confined to the tenant of the freehold, but could be maintained by the alienee of the injured party, and against the alienee of the tort-feasor, if the nuisance were continued after notice.¹ The writ of *praecipe quod reddat* lay for an acre of ground covered with water.² The *assize of nuisance* was a writ wherein it was stated that the party injured complained of some act done to the injury of his freehold, and commanded the sheriff to summon an assize or jury and view the premises, and have the jury at the next commission of assizes, that justice be done therein. It also was confined to the tenant of the freehold, and to things appendant or appurtenant thereto.³ The plaintiff, if successful, had judgment as in the writ of *quod permittat*, for abatement and damages. This remedy was extended by St. Westm. 2, 13 Edw. I., c. 24, so as to lie against the tort-feasor's alienee.⁴ But these writs were both out of use in Blackstone's time,⁵ and were expressly abolished by St. 3 & 4 Wm. IV., c. 27, § 36.⁶ In New York, in the case of an indictment for a nuisance, the writ commanding the sheriff to prostrate the nuisance was issued only after a record was regularly made out and returned of the conviction of the defendant.⁷ The assize of nuisance was retained by statute in this State under the name of writ of nuisance, and the proceedings thereunder simplified; but the remedy was not favored by the courts.⁸ In proceedings upon the writ of nuisance, as retained

¹ 3 Bl. Com. 220, 221; Penruddock's Case, 5 Rep. 100 b.

² Woolrych, 277.

³ Vin. Abr. Nuisance, 27 (H.); Britton, Bk. 2, c. 30, § 1 (Nichols's ed. p. 398).

⁴ Baten's Case, 9 Rep. 55 a (note); 3 Bl. Com. 220, 221.

⁵ 3 Bl. Com. 220, 221.

⁶ These remedies have been held obsolete in America. Blunt v. Aikin,

15 Wend. 522; Kintz v. McNeal, 1 Den. 436; Waggoner v. Jermaine, 3 Den. 306; Plumer v. Harper, 3 N. H. 88.

⁷ People v. Valentine, 1 Johns. Cas. 336.

⁸ Clark v. Storrs, 4 Barb. 562; Brown v. Woodworth, 5 Barb. 551; Cornes v. Harris, 1 Comst. 223; and see Ellsworth v. Putnam, 16 Barb. 565; Hutchins v. Smith, 63 Barb. 251.

by the Revised Statutes of New York of 1830, in the action of nuisance substituted therefor, and by the former code, § 454, it was necessary for the plaintiff to aver that he was the owner of the freehold at the time the acts complained of were committed; and in cases where the action was brought to abate the nuisance, it was required to be against the owner of the fee at that time, or, if he had aliened, against him or his alienee,¹ and these rules are retained by the Code of Civil Procedure of 1880.² A similar equitable action is maintainable in the Supreme Court, by any person specially injured by a nuisance, in which a judgment would be granted directing the removal or abatement of the nuisance.³

§ 369. Trespasses include all torts to real property cor-

¹ *Ellsworth v. Putnam*, 16 Barb. 565; *Hubbard v. Russell*, 24 Barb. 404; *Brown v. Woodworth*, 5 Barb. 550. So held in case of a noxious trade. *Hutchins v. Smith*, 63 Barb. 251.

² See Code, c. 14, art. 7, §§ 1660-1663.

³ *Knox v. Mayor*, 55 Barb. 404; s. c. 38 How. 67; *Delaney v. Blizard*, 7 Hun. 7; *Van Brunt v. Ahearn*, 13 Hun. 388. For a similar equitable action in Minnesota, see *Eastman v. St. Anthony Water Power Co.*, 12 Minn. 137; *Ames v. Cannon River Manuf. Co.*, 27 Minn. 245. In the last case the judgment directed the cutting down of the dam. The Massachusetts statute of 1828, c. 137, § 6, provided that where judgment should be rendered for the plaintiff, in an action on the case for a nuisance, the court may on motion of the plaintiff, in addition to the common execution, issue a warrant to abate the nuisance. In *Bemis v. Clark*, 11 Pick. 452, this statute was held to leave it within the discretion of the court whether to issue the warrant on such motion or not. See *Bemis v. Upham*, 13 Pick. 170; *Codman v. Evans*, 7 Allen, 431. This provision is

retained by Mass. Pub. Sts. 1882, c. 180, § 1. By § 3 of this chapter, the plaintiff is entitled to abatement as of right in a second suit. A similar judgment of abatement may be had in Wisconsin. Rev. Stats. 1878, c. 137. And this jurisdiction, which at first was in bar of equitable jurisdiction, is no longer so. St. 1882, c. 190; *Denner v. Chicago Railroad Co.*, 15 N. W. Repr. 158. For a similar jurisdiction in Oregon, see Oregon Gen. Laws. 1872, § 330, p. 179; *Marsh v. Trullinger*, 6 Oregon, 356. The assize of nuisance was formerly in use in Pennsylvania. *Livezey v. Gorgas*, 1 Binn. 251; s. c. 2 Binn. 192. For a full report of all the proceedings in this case, see Brackenridge's Law Miscellanies, 438. See *Lyle v. Richards*, 9 S. & R. 322, at 367; *Barnet v. Ihrie*, 17 S. & R. 174; s. c. 1 Rawle, 44; *Maris v. Parry*, 3 Rawle, 413. But it was sustained only because the remedies of the English common law were in force unless expressly abolished. *Barnet v. Ihrie*, 17 S. & R. 174. Other references to these remedies may be found in *Great Falls Co. v. Worster*, 15 N. H. 412, 435; *Tate v. Parish*, 7 Mon. (Ky.) 325.

poreal by acts wrongful in themselves and immediately injurious. Nuisances include all injuries to the realty, in which the harm done is consequential and not immediate. A trespass implies an illegal entry, or direct injury to land in the plaintiff's possession; a nuisance implies an act or omission injurious only in its consequences. The action of trespass lies for the former injury, and the action on the case for the latter. The distinction between the remedies is explained in the books on pleading.¹ It is our purpose to state only its applications to injuries done to or by means of waters.

If a person pours water on another's land, the injury is immediate, and trespass lies; but if he places a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the injury is consequential, because the flowing of the water, which is the immediate injury, is not the wrong-doer's immediate act, but only the consequence thereof, which will not render the act itself a trespass or immediate wrong.² Where the defendant caused water to overflow the plaintiff's fishery by throwing down a weir, trespass was brought, and a count was joined for the consequential damages; the act was held to be a plain trespass, and the injury, which was laid with a *per quod*, mere aggravation.³ Where the defendant dug ditches and diverted a watercourse, and case was brought, it was objected that the diversion had not been shown to be a consequence of the digging, but the court held that it would be so intended after

¹ 1 Chitty Pl. 142, 194; and see *Scott v. Shepard*, 1 Smith's Lead. Cas. 549.

² *Reynolds v. Clarke*, 1 Stra. 634, 635; 2 Ld. Raym. 1399.

³ *Courtney v. Collet*, 1 Ld. Raym. 272; s. c. *Carthew*, 436; 12 Mod. 164; and cited Stra. 635, and 2 Wm. Bl. 898. This case has generally been considered one where the act was done on the plaintiff's close by the defendant as a trespasser (*Angell*, § 395; *Woolrych*, 278), but this, it seems, is not the true view. The syllabus in

Lord Raymond's report reads: "Causing water to overflow another's fishery or land, though by an act on the party's own soil, is a direct trespass." And the same version is given in *Carthew*, 436. In Stra. 635, Lord Raymond, C. J., states the case as one "for the defendant's diverting his own watercourse in his own land," which was held a trespass. In 2 Wm. Bl. 898, it is cited as for an act done "in the plaintiff's own land," which seems an obvious substitution of "plaintiff" for "defendant."

verdict, and that case was the proper form of action.¹ So the turning of water which washes a highway upon one's land has been held ground for an action on the case.²

§ 370. It is laid down by Mr. Dane that when the plaintiff is possessed of the soil and a wrong is done directly to his estate, he may have trespass, but generally, where the defendant so disturbs the plaintiff in his stream or water-course as to occasion consequential damages, case is the proper action in all cases where the defendant does the original act on his own land.³ The rule is laid down by Shaw, C. J., in *Fiske v. Framingham Manuf. Co.*,⁴ that where the act complained of is not an entry upon the plaintiff's land, or other direct injury, but the opening of a sluice upon the defendant's own land, or land upon which he has a right to enter, in consequence of which the plaintiff's land is flooded, case and not trespass is the proper form of action. Where trespass was brought for breaking the plaintiff's close and erecting thereon a wall by which the plaintiff was prevented from using the water in her well, and it appeared that the well belonged to the defendant, and was on his land, but that the plaintiff had a right to use the water in it, it was held that the plaintiff's remedy was in case and not in trespass.⁵

§ 371. To maintain trespass, the plaintiff must have actual or constructive possession of the *locus in quo*. He must show that the portion of land on which the wrongful act was committed was in his inclosure, or that he had paramount title if it was vacant, or that he was in the actual possession of a part under a deed for the whole, embracing the part upon which the act was committed. Trespass will not lie against a person for digging a ditch upon his own land, whereby water is thrown upon the land of the plaintiff, the

¹ *Leveridge v. Hoskins*, 11 Mod. 257.

² *Broughton v. Carter*, 18 Johns. 405.

³ 3 Dane Abr. c. 71, art. 3, p. 10.

⁴ 12 Pick. 68.

⁵ *Shafer v. Smith*, 7 Har. & J. 67.

remedy in such case being by an action on the case for consequential damages.¹ Where it was alleged that the plaintiff was the owner of a mill on the same stream with the mill owned by the defendant, and that the defendant, wilfully and with intent to injure the plaintiff, frequently shut down his gates, so as to accumulate a large head of water, and then raised them, by which means an immense volume of water ran with great force against the plaintiff's dam and swept it away, it was held that case could not be maintained, and that trespass was the only remedy.² The decision here turned on the violence and continuous force by which the injury was effected, and, it seems, is not in conflict with the ruling of Shaw, C. J., above cited, which made allowance for direct injuries.

§ 372. The case of *Smith v. Fletcher*,³ in England, was tried before the passage of the Judicature Acts. It was an action against the defendant for injuries caused by water which he had accumulated upon his land, and which burst the banks in its course during a flood and escaped into the plaintiff's mine. The plaintiff alleged that the defendant "broke and entered a close of the plaintiff called C., and certain mines thereunder, and flooded them with water." The form of the action was not considered, but a recovery was had as for

¹ *Winkler v. Meister*, 40 Ill. 349. As one owning land adjacent to a stream above the tide owns to the *medium filum*, he owns the ice formed therein, which may be regarded as attached to the soil, and, like any other accession, be considered as part of the realty, and the owner may maintain trespass against any one wrongfully appropriating it. *Washington Ice Co. v. Shortall*, 101 Ill. 46; s. c. 21 Am. L. Reg. (N. S.) 313, and notes; *ante*, § 191.

² *Kelly v. Lett*, 13 Ired. L. 50.

³ *Smith v. Fletcher*, L. R. 7 Ex. 305; 2 App. Cas. 781. In an action on the case for obstructing ancient lights, by a building partly on the plaintiff's

ground, the question was raised. Lord Abinger, C. B., said: "It is said that the action should have been trespass. No case has been cited to show that where an injury has been done, partly by an act of trespass and partly by that which is not an act of trespass, but the subject of an action on the case, the plaintiff is bound to adopt one or the other form of action. I can see no reason which prevents the present form of action from being resorted to, that would not be equally applicable to an action of trespass. If the argument be good for anything, that an action on the case cannot be maintained by parity of reasoning, an action of trespass could not; so that

a trespass. But where new systems of procedure have abolished the different forms of action, the distinction between trespass and case has become unimportant.¹

§ 373. For injuries to incorporeal rights in waters, such as easements, trespass cannot be supported, and case is the proper remedy.² Where the rights of the parties to the water are regulated by a contract, case will still lie for any negligence or misfeasance in the execution of the contract, or where there is a breach of duty imposed by law, independent of the contract. Where mill-owners, who were entitled to all a certain stream except what they had leased to the defendants, brought suit against the defendants for diverting more water than they had a right to take, case was held the

it would prove that the plaintiff is not entitled to maintain any action. I should have thought that the plaintiff might bring either action, case, or trespass. Suppose a person to be affected in the enjoyment of a water-course by the erection of a weir partly placed on his own land and partly on his neighbor's; that which was placed on his own land would be the subject of an action of trespass. If the acts be both done at the same time, and there be a common injury, it seems to me the plaintiff may bring either case or trespass, alleging the common damage. There are not wanting analogies to show that where there is a common injury there may be a common remedy, and a party may adopt either; as in the cases of nuisances where the act is committed in one county and the effect is produced in another, the venue may be laid in either. However specious the argument which has been urged, it will not bear investigation; but the result is, that the party might have brought either form of action." *Wells v. Ody*, 1 M. & W. 452; s. c. *Tyrwh. & Gr.* 715.

¹ "This distinction between tres-

pass and nuisance," say Coulson and Forbes, in their recent work on the Law of Waters, p. 649, "so far as the form of action is concerned, is now of little value, as by the Common Law Procedure Act, 1852, and the Judicature Acts, 1873 and 1875, all forms of action are abolished." The same is true in many of the States which have abolished the old forms.

² 1 Chitty Pl. 142; *Nuttall v. Braccwell*, L. R. 2 Ex. 1; *Wilson v. Wilson*, 2 Vt. 68; *Case v. Webber*, 2 Ind. 108. So held of an injury to a right to convey water through another's land. *Baer v. Martin*, 8 Blackf. 317. So where one conveyed a mill, and granted an easement in the dam and pond, and afterwards injured the dam, the grantee's remedy was held to be case, and not trespass. *Whitehead v. Garvis*, 3 Jones L. 171. But where the conveyance of a water privilege is of "all the land that the dam flows," trespass is the proper remedy for an injury to such land. *Morse v. Marshall*, 13 Allen, 288. Cutting off one's access to a body of water upon which his land fronts is an actionable injury, although his title extends only to the water's edge. *Ante*, § 149.

proper remedy, and not covenant.¹ A grantee may maintain case for diversion of water by a grantor, which is in derogation of his grant.² Where the defendant contracted for the privilege of floating logs through the plaintiff's mill-dam and flume at a stipulated price, and agreed to repair and pay all damage done, it was held that case would lie for damage carelessly and negligently done to the plaintiff's dam.³ The action on the case is the proper remedy for the owner of property who is injured by the nuisance of projecting eaves or roofs of an adjoining building causing rain to overflow upon his land.⁴

§ 374. An action on the case lies for any wrongful diversion of water from a mill,⁵ or for any diversion or obstruction

¹ *Bigelow v. Battle*, 15 Mass. 313. See *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 230.

² *Cromwell v. Selden*, 3 N. Y. 253; *Eshelman v. Snyder*, 82 Ind. 498.

³ *Dean v. McLean*, 48 Vt. 412. Where the defendant had for several years flowed the plaintiff's land, paying an annual compensation therefor, under an oral agreement, it was held, in an action to recover damages for such flowage, that the relation of landlord and tenant existed between the parties, and that the plaintiff could maintain no action except for the yearly compensation, without giving notice to quit. *Morrill v. Mackman*, 24 Mich. 279.

⁴ *Rolfe v. Rolfe*, T. Moore, 353, cited there in *Beswick v. Combdon*; s. c. cited, 5 Rep. 101; *Penraddock's Case*, 5 Rep. 101; *Battishill v. Reed*, 18 C. B. 696; *Codman v. Evans*, 7 Allen, 431; *Whitney v. Sanders*, 3 Pitts. 226; *Gould v. McKenna*, 86 Penn. St. 297. In *Aikin v. Benedict*, 39 Barb. 400, overruling *Sherry v. Frecking*, 4 Duer, 452, it was held that trespass on the case or the statutory action for nuisance was the proper remedy for such an injury, and not ejectment. The erection of eaves projecting over another's land

is a nuisance, for which case will lie without proof that rain has fallen since the erection. *Fay v. Prentice*, 1 C. B. 828. See *Bellows v. Sackett*, 15 Barb. 96. But where the injury complained of is caused by rain thrown on his premises by such eaves, the injury must be proved as laid. *Simmons v. Pollard*, 53 Vt. 343. It is held that the landlord of the injured premises may maintain case as a reversioner for such a nuisance during the term, if the jury think the reversion is injured. *Tuckerman v. Newman*, per Lord Denman, C. J., 11 A. & E. 40. Compare *Jackson v. Pesked*, 1 M. & S. 234, where Lord Ellenborough held that injury to the reversion must be alleged in such case. See *ante*, §§ 292, 293.

⁵ So held in case of an ancient mill. *Broome v. Mordant*, Cro. Eliz. 112. See *Ingraham v. Hutchinson*, 2 Conn. 504. But if right claimed is that of an ancient mill, a prescriptive right must be shown. *Platt v. Johnson*, 15 Johns. 213. Mere inconvenience to an ancient mill by increase of rubbish in the stream held no cause of action. *Palmer v. Mulligan*, 3 Caines, 307. Wrongful diversion from new mill. *Dyer*, 248 b; *Cox v. Matthews*, 1 Vent. 237. An injury by a dam,

to the injury of a riparian proprietor;¹ and if the defendant has the right to maintain a dam at a certain height, the action will lie against him for wrongfully increasing the height.² So the action lies if a person, having a preferred right to the water, uses it wrongfully to the injury of one entitled to the surplus.³ So, if water is accustomed to flow to a well and thence to one's house for his use, and one diverts the stream from coming to the well.⁴ If one disturbs the plaintiff in the use of his well by putting rubbish therein, case will lie if the water is shallowed and rendered less convenient for use.⁵

§ 375. Case is also the appropriate remedy for the pollution of a watercourse to the injury of another. It was decided, in a case reported in the Year Books, that if two several owners of houses have a river in common between them, which one corrupts, the other shall have an action upon the case;⁶ and the action has been allowed without question ever since.⁷ So, if one abandons waters artificially

causing a growth of grass in a stream, which impedes its flow, is actionable in case, unless the grass would have grown without the dam. *Knoll v. Light*, 76 Penn. St. 268.

¹ *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 3 B. & Ad. 304; s. c. 5 B. & Ad. 7; 3 Kent Com. 442; *Martin v. Bigelow*, 2 Aik. (Vt.) 184.

² *Phillips v. Sherman*, 64 Me. 171; *Sackrider v. Beers*, 10 Johns. 241; *Merritt v. Brinkerhoff*, 17 Johns. 306. So where the defendant (maintaining a dam under the Mill Acts) wrongfully closes his gates at night to collect water, the remedy is in case. *Thompson v. Moore*, 2 Allen, 350.

³ *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 230.

⁴ 1 Com. Dig. Title Action upon the case for a nuisance (A.). *Psickman v. Tripp*, Skin. 389.

⁵ *Taylor v. Bennett*, 7 C. & P. 329.

⁶ Y. B. 13 H. 7, 26, cited in *Co. Litt.* 200 b.

⁷ The right to the natural purity of

the stream and the nature of acts impairing such purity have already been considered. *Ante*, §§ 219-223. Leading cases illustrating the use of the action on the case are: *Wood v. Waud*, 3 Exch. 748; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Norton v. Scholefield*, 9 M. & W. 565; *Hodgkinson v. Ennor*, 4 B. & S. 229. See *Cator v. Lewisham Board*, 5 B. & S. 115; *Locks & Canals v. Lowell*, 7 Gray, 223; and *Mills v. Hall*, 9 Wend. 315; *Thomas v. Brackney*, 17 Barb. 655; *Carhart v. Auburn Gas Co.*, 22 Barb. 297; *O'Riley v. McChesney*, 3 Lans. 278; *Merrifield v. Worcester*, 110 Mass. 216; *Woodward v. Aborn*, 35 Maine 271; *Washburn v. Gilman*, 64 Maine 163; *Wheatley v. Chrisman*, 24 Penn. St. 298; *Little v. Schuylkill Nav. Co. v. Richards*, 57 Penn. St. 142; *Seeley v. Alden*, 61 Penn. St. 302; *Sanderson v. Penn. Coal Co.*, 86 Penn. St. 401; s. c. 94 Penn. St. 302; *Snow v. Parsons*, 28 Vt. 459; *Gladfelter v. Walker*, 40 Md. 1 *Story v. Hammond*, 4 Ohio, 376.

collected, and turns them into a natural stream, he cannot afterwards reclaim them; and if he attempts to withdraw them from the stream, he is liable in case to any one injured thereby.¹ Where the canal commissioners of Illinois turned the surplus water of a certain canal into a natural stream to get rid of it, and so increased the volume of the stream, and their lessee, succeeding to their rights, diverted a portion of the water from the stream to drive his mill, and returned it to the stream below the plaintiff's mill, thereby diminishing the volume of water at the plaintiff's mill, it was held that the plaintiff could maintain case.²

§ 376. Actions for torts affecting rights in water, and also for torts done by means of water, must in general be brought in the name of the person whose *legal* right has been affected, and who had a legal interest in the property injured at the time the injury was committed.³ For any injury affecting the present enjoyment of water-rights, the person entitled to the present enjoyment thereof is the proper party to bring the suit; but for any permanent injury to such rights the reversioner may maintain an action.⁴ The same rule holds true of all injuries to real property by means of water.⁵ The remedies of the tenant in possession and the reversioner may be concurrent. The act which injures the reversioner usually injures the tenant in possession also, and each may maintain his action for the injury to his separate right.⁶ This principle applies to all injuries to lands or water-rights in the possession of lessees.

¹ *Adams v. Slater*, 8 Brad. (Ill. App.) 72; *Druley v. Adams*, 102 Ill. 177; and see *Davis v. Gale*, 32 Cal. 26.

² *Adams v. Slater*, 8 Brad. (Ill. App.) 72.

³ 1 Chitty, Pleading, 69.

⁴ Mr. Dicey says (*Parties*, p. 332, note) that the term reversioner is used as a convenient though not strictly correct description of any person who, not being in possession of land, has a future interest in it.

⁵ 1 Chitty, Pl. 63; Com. Dig. Action upon the case for a nuisance B.;

Dicey on Parties, 333, 340. Prior of Southwark's Case, Year Book, 13 Hen. 7, 26, cited by Wray, C. J., in *Aldred's Case*, 9 Rep. 59 a; *Beddingfield v. Onslow*, 3 Lev. 209; *Jackson v. Pesked*, 1 M. & S. 234; *Tucker v. Newman*, 11 A. & E. 40; *Battishill v. Reed*, 18 C. B. 696; *Bell v. Twentyman*, 1 Q. B. 766; *Lord Egremont v. Pulman*, M. & M. 404; *Dobson v. Blackmore*, 9 Q. B. 991.

⁶ 1 Chitty Pl. 63; Com. Dig. Title Action on the Case for a Nuisance B.; 1 Wms. Saund, 322, note 5;

§ 377. Where the tenant in possession brings suit for the disturbance of his present enjoyment, possession alone is sufficient evidence of his title *prima facie*, and will support a recovery against a wrong-doer.¹ So a *cestui que trust* in possession may maintain the appropriate legal actions against a wrong-doer for injuries to his possession.² In *Sumner v. Tileston*,³ where the owner of the freehold brought suit for flowage, it was held that the possession of a tenant at will was that of the owner of the freehold, and that the latter could recover for present injury. The lessee of water-rights may maintain an action against a stranger for any interference therewith to the injury of the lessee.

§ 378. The reversioner may sue for any wrongful interference with the future enjoyment of the property. This includes all acts directly injuring his freehold, and all adverse uses tending to establish easements or to abridge his rights. He may also sue for any acts interfering with his title. In the *Prior of Southwark's Case*,⁴ as cited by *Wray, C. J.*, in *Aldred's case*,⁵ the landlord was allowed to

Beddingfield v. Onslow, 3 Lev. 209; *Ripka v. Sergeant*, 7 Watts & S. 9; *Hart v. Evans*, 8 Penn. St. 13; *Seely v. Alden*, 61 Penn. St. 302; *Potts v. Clarke*, *Spencer (N. J.)* 536; *Tinsman v. Railroad Co.*, 1 Dutch. (N. J.) 255; *Brown v. Bowen*, 30 N. Y. 519; *Woodbury v. Wills*, 50 Maine, 403; *Davis v. Jewett*, 13 N. H. 881; *Baker v. Sanderson*, 3 Pick. 348; *Sumner v. Tileston*, 7 Pick. 195; *Ashley v. Ashley*, 4 Gray, 197. The following leading cases further illustrate the rule, but do not affect waters: *Baxter v. Taylor*, 4 B. & Ad. 72; *Hopwood v. Schofield*, 2 Moo. & Rob. 34; *Alston v. Scales*, 9 Bing. 3; *Johnstone v. Hall*, 2 K. & J. 414; *Mumford v. Oxford Railway Co.*, 1 H. & N. 34; *Kidgill v. Moor*, 9 C. B. 364; *Simpson v. Savage*, 1 C. B. N. s. 347; *Metropolitan Building Association v. Petch*, 5 C. B. N. s. 504; *Bell v. Midland Railway Co.*, 10 C. B. N. s. 287.

¹ *Bassett v. Salisbury Manuf. Co.*,

28 N. H. 438; *Branch v. Doane*, 17 Conn. 401; s. c. 18 Conn. 233; *Brown v. Bowen*, 30 N. Y. 519; *Lincoln v. Chadbourne*, 56 Maine, 197; *King v. Tarlton*, 2 H. & McHen. 473; *Ferguson v. Witsell*, 5 Rich. (S. C.) 280; *Kimball v. Walker*, 7 Rich. (S. C.) 422; *Patrick v. Ruffners*, 2 Rob. (Va.) 209; *Morris v. McCahey*, 9 Ga. 160; *Ran v. Minnesota Valley Railroad Co.*, 13 Minn. 442. In *Dyson v. Collick*, 5 B. & Ald. 600, a contractor for building a canal, having by permission of the owner of land built a dam for the purpose of aiding navigation, was held to have sufficient possession to enable him to maintain trespass against a wrong-doer.

² 1 Chitty, Pl. 69.

³ 7 Pick. 198 (*Putnam, J.*, dissented). And see, to same effect, *Cushing v. Adams*, 18 Pick. 110.

⁴ Year Book, 13 Hen. 7, 26.

⁵ 9 Rep. 59 a.

recover for an injury to land in the possession of a tenant by corrupting water with the refuse of a lime-pit. In *Bedingfield v. Onslow*,¹ flowage was held an injury to the reversion. The overhanging of eaves or walls has been held not such an injury *per se*;² and in another case,³ this question was left to the jury by Lord Denman, with the suggestion that it was a fair case of injury to the reversion. The washing away of soil, resulting from the non-repair of a conduit or gutter leading to the defendant's mill, has been held an injury to a reversioner;⁴ but a general allegation of an injury to the reversion by an obstruction of navigation has been held insufficient.⁵

§ 379. In America it has been held that the freehold is injured by causing water to flow back upon the plaintiff's land,⁶ or into his race,⁷ or by the obstruction of his mill by backwater;⁸ or again by withholding the water from his mill;⁹ or by diverting a natural watercourse from his land;¹⁰ or by polluting the stream;¹¹ and that the reversioner may recover for such injuries. The owner of land leased at will for purposes of pasturage may maintain an action for the obstruction of a right to drain the land through an ancient watercourse, but must show and can only recover for the injury to the reversion.¹²

¹ 3 Lev. 209. To same effect see *Bell v. Twentyman*, 1 Q. B. 766.

² *Jackson v. Pesked*, 1 M. & S. 234.

³ *Tucker v. Newman*, 11 A. & E. 40. In another case, where the reversioner brought suit for the same injury, it was held that he could recover only such damages as the jury should think sufficient to compel the defendant to abate the nuisance, and not the damage to the saleable value of the premises. *Battishill v. Reed*, 18 C. B. 696.

⁴ *Lord Egremont v. Pulman*, M. & M. 404.

⁵ *Dobson v. Blackmore*, 9 Q. B. (A. & E. n. s.) 991. In *Shadwell v. Hutchinson*, 4 C. & P. 333; s. c. M. & M. 350 (affecting ancient light), case was

held maintainable by a reversioner for a nuisance which produced no present injury beyond that to the reversionary right, and which may be removed before the reversioner would come into possession. See also *Bell v. Midland Railway Co.*, 10 C. B. n. s. 287.

⁶ *Davis v. Jewett*, 13 N. H. 88; *Ashley v. Ashley*, 4 Gray, 197; *Potts v. Clarke, Spencer* (N. J.) 536.

⁷ *Ripka v. Sergeant*, 7 Watts & S. 9.

⁸ *Baker v. Sanderson*, 3 Pick. 348; *Sumner v. Tileston*, 7 Pick. 198; *Brown v. Brown*, 30 N. Y. 519.

⁹ *Woodbury v. Willis*, 50 Maine, 403.

¹⁰ *Hart v. Evans*, 8 Penn. St. 14.

¹¹ *Seeley v. Alden*, 61 Penn. St. 302.

¹² *Hastings v. Livermore*, 7 Gray, 194; s. c. 15 Gray, 10.

§ 380. Anything which will create a permanent disturbance of the enjoyment of property if not altered is in this inquiry considered an injury to the freehold. Thus the building of a railway embankment in a stream, obstructing the passage of rafts to and from a lumber mill, was held by Green, C. J., to be an injury to the reversion, for which the owner of the mill might recover, although the mill was leased for a term which had several years to run. The concurrent right of the tenant to sue for his injury was considered no objection, nor was the possibility that the cause of injury might be removed during the term.¹

§ 381. When the disturbance is continued, fresh actions may be maintained from time to time by the persons occupying the positions of tenant in possession and reversioner.² A purchaser may maintain an action for a nuisance created before the purchase, if continued,³ and an heir or devisee, for the continuance of a nuisance created in the lifetime of the ancestor or devisee;⁴ but an executor cannot recover for a nuisance committed in the lifetime of his testator.⁵ A mortgagee's right of action for an infringement upon his mill privilege vests upon his taking possession of the premises.⁶

¹ *Tinsman v. Belvidere Railroad Co.*, 25 N. J. L. 255. Green, C. J., said: "While the nuisance or cause of complaint is continued, the premises are diminished in value, and the present value of the reversion is consequently diminished. The estate of the reversioner would sell for less. The law therefore regards him as sustaining an injury. And, if the inheritance be in fact diminished in value, the reversioner may maintain an action for the injury, though there may have been no diminution in the amount of the rent, and no loss by a sale of the premises at a depreciated price." He approved the rule in *Shadwell v. Hutchinson*, *supra*, allowing the reversioner to recover nominal damages in the first instance, and then substantial damages; and criticised the rule in *Baker v. Sanderson*, 3 Pick. 348, where it was held that he could recover only

for loss of rent. So in *Ripka v. Sergeant*, 7 Watts & S. 9, it was held that the law implied a damage to the reversion from back flowage upon a mill race.

² *Penruddock's Case*, 5 Rep. 101; *Shadwell v. Hutchinson*, 2 B. & Ad. 97; s. c. 4 C. & P. 333; *Battishill v. Reed*, 18 C. B. 696; and see *Gale on Easements* (5th ed.), 658; *ante*, § 210.

³ *Beswick v. Combden*, Cro. Eliz. 402; *Russell and Handford's Case*, 1 Leon. 273; *Vedder v. Vedder*, 1 Den. 257.

⁴ *Some v. Barwish*, Cro. Jac. 231.

⁵ *McLaughlin v. Dorsey*, 1 H. & McHen. (Md.) 224. An action for diversion dies with the plaintiff, and cannot be continued by his executor. *Holmes v. Moore*, 5 Pick. 257.

⁶ *Hatch v. Dwight*, 17 Mass. 289; *ante*, § 211 b.

§ 382. At common law, parceners and joint tenants were required to join in all actions respecting their tenancy; and tenants in common, who sued separately in the ancient real actions, because claiming by different titles, were compelled to join in personal actions, as for trespass and nuisance, "because in those actions, though their estates are several, yet the damages survive to all."¹ It is sometimes stated that tenants in common *may* join in actions for such injuries;² but Shaw, C. J., in deciding upon a bill in equity between tenants in common, for the wrongful detention of water from a mill, said: "Though the phrase 'may join' is used, yet the reason given brings the case within the general rule of law, that where a personal claim is joint, and the right survives, all must join, otherwise the process may be abated."³ Owners in common of a mill, who have derived their respective rights under different conveyances, may join in an action in tort for a diversion of water from their mill, but cannot join in an action for breach of defendant's covenants in reference to such water.⁴ If tenants in common of lands, owning adjoining lands in severalty, grant a license to a stranger to erect and maintain a dam on their land, each is estopped from claiming damages occasioned thereby to land held by him in severalty.⁵

¹ Bacon's Abr. Joint Tenants, K. (Bouvier's ed.) p. 301; Litt. § 316; Co. Lit. 198a; 1 Chitty Pl. 74; Dicey on Parties, 380, Rule 80; Thompson v. Hoskins, 11 Mass. 419; Crippen v. Morss, 49 N. Y. 63, 69. In Stone v. Bromwich, Yelv. 161, where tenants in common brought an action for diverting a watercourse and set out their titles, it was objected that they should not be joined, but the court overruled the objection, saying, "This action . . . does not concern the title, but only the possession whereby the profits of the land are diminished."

² Angell on Watercourses, § 400.

³ May v. Parker, 12 Pick. 34.

⁴ Samuels v. Blanchard, 25 Wis. 329.

⁵ Francis v. Boston & Roxbury Mill Co., 4 Pick. 365. In England, by Order xvi. of the Judicature Act of 1875, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the court, in disposing of the costs of the motion, shall otherwise direct. L. R. 10 Gen. St. p. 791 (38 & 39 Vict. c. 77):

§ 383. One tenant in common has no right, by means of a dam erected on land of which he is sole owner, to flow the land owned in common without the assent of his co-tenant, and thus exclude his co-tenant from the possession. It is a wrong to his co-tenants of the same character, and which allows of similar remedies, as if they had been severally seized.¹ So one tenant in common may have an action on the case against his co-tenant for diverting, obstructing, or polluting water to the injury of their common right, or for any infringement upon their common rights in water, or for flowing common lands or properties, without the consent of the co-tenant.² In the earliest case in point it is said that if two several owners of houses have a river in common between them, if one of them corrupt the river, the other shall have an action upon his case.³ The leading American case was an action by one co-tenant against another, for diverting a stream from their common mill for purposes of his own. It was held that case was the proper remedy, and this case has generally been followed.⁴

See Coulson and Forbes on Waters, 656. By the rules of chancery, which are followed in the Judicature Acts, the owners of several properties affected by a nuisance might join in suing. If one failed to make out his case, the suit as to him was dismissed with costs. Such costs were deducted from those of the successful plaintiff. Coulson & Forbes on Waters, 656. In a Scotch case, for a pollution of the River Esk, the House of Lords held that, by the Scotch practice, the several sufferers may bring a joint action against the several authors of the nuisance, asking a declarator and interdict, but not claiming damages; and Lord Blackburn said that this rule, though different from the English law, was preferable. For the English rule, *contra*, see Cowan v. Duke of Buccleuch, 2 App. Cas. 344; Hudson v. Maddison, 12 Sims. 416.

¹ Per Parker, C. J., in *Great Falls Co. v. Worster*, 15 N. H. 312, 460, and

in *Odiorne v. Lyford*, 9 N. H. 502.

² Y. B. Hen. 7, 26; *Blanchard v. Baker*, 8 Greenl. (Mc.) 253; *Hutchinson v. Chase*, 39 Maine, 508, 514; *Pillsbury v. Moore*, 44 Maine, 154; *Hines v. Robinson*, 57 Maine, 324; *Odiorne v. Lyford*, 9 N. H. 502; *Great Falls Co. v. Worster*, 15 N. H. 412, 460; *Beach v. Child*, 13 Wend. 343; s. c. 22 Wend. 538; *Crippen v. Morss*, 49 N. Y. 63; *McLellan v. Jones*, 43 Vt. 183 (5 Am. Rep. 270); *Jones v. Weathersbee*, 4 Strob. (S. C.) 50.

³ 2 Waterman on Trespass, p. 392. So if one co-tenant hinders another from cleansing a common well. *Newton v. Newton*, 17 Pick. 201, 207. So one may have case against his co-tenant for cutting down or injuring a dam held in common. *Linton v. Wilson*, 1 Kerr (N. B.) 223, 231.

⁴ *Blanchard v. Baker*, 8 Maine, 253 (1832). The Massachusetts case of *May v. Parker*, 12 Pick. 34, in equity, before cited, was decided in the pre-

§ 384. Where the plaintiff and defendant were tenants in common of a salmon fishery, the plaintiff was held entitled to

ceding year. Shaw, C. J., there said: "The consideration that the right to recover damage is joint, and survives, suggests the application of another rule of law, that where there is a joint right to claim damage, each has a right to claim the whole, holding himself liable to account, and if the claim be against one of the parties, he has as good a right to retain the amount as they have to recover it, and it would involve the legal solecism of a man's having an action against himself. The same reason, therefore, which prohibits co-partners from suing one of their number, who is debtor to the firm, and obliges them to go into equity for relief, seems to apply strongly to the case of a joint claim for consequential damages against one of the co-tenants." This dictum has been disregarded. The case of *Odiorne v. Lyford*, 9 N. H. 502, was decided in 1838. *May v. Parker*, C. J., said of it: "In *May v. Parker*, the court held that where a person being sole owner of one mill, and tenant in common of another, uses in his several mill more water than appertains to it, to the injury of the mill owned in common, a bill in equity may be maintained. It is not decided in that case that an action at law would not lie, but only that the remedy at law, if one existed, would be inadequate for the redress of the wrong done." "The act of the defendant in flowing the common property in this case, if without right, is not a mere entry and possession, as a tenant in common, subjecting him to account for the profits, but it is an act which tortiously deprives the plaintiff of the use of the property, and is in the nature of a destruction of the use for which it was intended." Since this decision, the dictum of Shaw, C. J., must be considered as

not giving a correct statement of the law. The reason he gives, viz., that the wrong-doer would have the same legal title to the amount of the damages as the injured party, is not sound in principle, and has not been applied to other cases of torts between co-tenants. In *Hines v. Robinson*, 57 Maine, 324, the action was against a tenant in common and a stranger, for using the water of a stream so as to impair the use of the mill held in common, and for erecting another mill which obstructed the use of the former. Barrows, J., said: "If the plaintiff can maintain a suit against any person for doing these acts, the fact that one of these defendants is his co-tenant in the property injured will not bar the action." In *Beach v. Child*, 13 Wend. 343, where three tenants in common constructed a basin for navigation and water-power, connecting it with a public canal, and laid out their lands fronting thereon in lots which they divided among themselves and afterwards conveyed, but left the basin common property, and one of the grantees built a pier in the basin in front of his lot, obstructing the adjacent owner's use of the basin, it was held that the latter could maintain an action on the case against his co-tenant for the obstruction. This decision was affirmed in the court of errors, 22 Wend. 538, and followed in *Crippen v. Morss*, 49 N. Y. 63. In *McLellan v. Jenness*, 43 Vt. 183 (5 Am. Rep. 270), the plaintiff and defendant and three others owned an aqueduct together, and each had a branch of his own, and was entitled to one-fifth of the water. The plaintiff brought the action against the defendant for using or wasting more than his fifth of the water, and the action was sustained. The court say: "The true principle is stated by Kenyon, Ch. J., in *Martyn*

recover damages in an action on the case for the continued deprivation of the enjoyment of his rights in being kept out of the occupation of any part of the fishery, after he was first deprived of it by the defendant, without having first regained possession by entry or otherwise.¹ One tenant in common of a saw-mill and mill privilege may maintain an action of trespass *quare clausum* against a co-tenant for the destruction of the mill,² but not for his entry upon the entire common property and exclusive occupation thereof.³ And where two tenants in common of land including a water privilege made a division of the land, leaving the water privilege in common, which was of sufficient power to drive but one mill, and each of them erected a mill on his own land, it was held that neither acquired a priority of right by first erecting his mill, that each had an equal right to the use of the water, and that neither could maintain an action founded in tort for such use of the water thus owned in common before their rights became several by the partition.⁴

§ 385. When land injured by a nuisance is conveyed, the purchaser stands in the same position as the vendor. He may sue the original wrong-doer who erected and maintains the nuisance, without notice or request to abate, for damages done to the land, during his ownership and occupancy. And the same is true of any number of successive purchasers against whom the nuisance is continued.⁵ In *Ives v. Cress*,⁶ it was held that a vendor of lands, retaining the

v. Knowllys, 8 T. R. 145, that, 'if one tenant in common misuse that which is in common with another, he is answerable to the other in an action as for misfeasance.' That was an action on the case by one tenant in common against his co-tenant, for cutting certain trees upon the common land.

¹ *Duncan v. Sylvester*, 24 Maine, 482.

² *Maddox v. Goddard*, 15 Maine, 218.

³ *Porter v. Hooper*, 13 Maine, 25.

⁴ *Bailey v. Rust*, 15 Maine, 440.

⁵ *Branch v. Doane*, 17 Conn. 402; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143, overruling *Woodman v. Tufts*, 9 N. H. 91, so far as *contra*; *Plumer v. Harper*, 3 N. H. 88. See *Penruddock's Case*, 5 Rep. 101 *a*; *ante*, §§ 364, 365.

⁶ 5 Penn. St. 118. Where the lessee of a term having several years to run diverted a watercourse at considerable expense, and made extensive improvements thereon, it was held

legal title, could not maintain an action on the case for such injuries to the inheritance during the possession of the vendee under the contract, though it did not appear that the vendee had become entitled to a conveyance.

§ 386. A right of action for a nuisance could not at common law be transferred to another by an instrument in writing for the purpose, or by conveying the land affected.¹ Such a right of action is not appurtenant to the land, nor does it, like a covenant for title, inhere to or run with the land. When accrued, it is a personal right and not transferable. Where a railway company placed a protection to a drawbridge in a river, whereby the approach of vessels to a dock was obstructed, and the value of the land on which the dock was placed was permanently depreciated, and afterwards the owner of the lot and dock sold the same to his wife, and conveyed the legal title to her, it was held that she could not maintain any action against the company for placing the obstruction in front of the dock, or for any damages arising since the conveyance. When such an injury is permanent in its nature, the owner may recover not only for the present, but also for future damages, and such a recovery will be a bar to any other suits for damages growing out of the continuance of the injury. The grantee of such injured party cannot in such case recover for the continuance of the injury, although the former owner may not have brought any suit for the original injury.² Where, from the improper grading of a street, the water flowing therein formed a gully which caused a permanent injury to a lot, it was held that the right of action for such injury accrued to the owner of the lot at the time the gully

that the injuries would not be presumed to be of such a permanent character as necessarily to affect the reversion, and that the lessor could not be required to enter a protest under the penalty of otherwise being estopped in equity, from objecting to the diversion. *Corning v. Troy Iron Factory*, 39 Barb. 311; 40 N. Y. 191; 34 Barb. 485.

¹ Dicey on Parties, 382; Baldwin v. Calkins, 10 Wend. 167; Ortwine v. Mayor of Baltimore, 16 Md. 387.

² *C. & A. R. R. Co. v. Maher*, 91 Ill. 312. For a similar question under the Wisconsin Mill Act, see *Faville v. Greene*, 12 Wis. 11.

was made; and upon the sale of the lot, did not pass to the grantee.¹ Where a railway company filled up a trestle-work and so caused a river to overflow certain flats, and the owner of the flats built cattle-pens thereon, in which a third party placed cattle under a contract with the owner of the land to feed them, it was held that the owner of the cattle could not recover for an injury to them by the overflow of the river, on the ground that his rights were only in contract with the owner of the pens, and on the further ground that he had placed himself in a position to be injured, or in other words, had come to the nuisance. The remedy, if any, against the company lay with the owner of the pens.²

§ 387. Every person who creates or continues a nuisance is liable to be sued by any person specially injured thereby.³ Each continuance of the nuisance is a fresh one,⁴ for which each successive occupier of the premises on which the nuisance is maintained is liable.⁵ The liability of one erecting and maintaining a nuisance is twofold; he is liable to an action for the erection, and for each continuance of the nuisance; and each action, being in respect of a new wrong, is not barred by former recoveries growing out of the same matter.

§ 388. If one creates a nuisance upon his premises, and then conveys them to another, he continues liable so long as it exists for all damages subsequently accruing, although a like liability may attach to other persons by their becoming purchasers; and in such cases the person injured may sue either the original wrong-doer or the person in possession of the premises.⁶ The same rule applies if the owner creates a nuisance and then lets the premises to a tenant. In Pen-

¹ *Ortwine v. Baltimore*, 16 Md. 387. 72; *Hodges v. Hodges*, 5 Met. 205;

² *Toledo Railroad Co. v. Hunter*, 50 Ill. 325. *Baldwin v. Calkins*, 10 Wend. 167;

³ *Dacey on Parties*, 422.

⁴ 3 Bl. Com. 220.

⁵ *Moore v. Brown*, Dy. 319 b; *Ryp-Beidelman v. Foulk*, 5 Watts, 308; *Ramsdale v. Foote*, 55 Wis. 557. The

pon v. Bowles, Cro. Jac. 373; 3 Dane

heir will be liable for continuing a nuisance erected by the ancestor. 3

Abr. 57; Staples v. Smith, 10 Mass.

Dane Abr. 57.

⁶ *Penruddock's Case*, 5 Rep. 100 b;

ruddock's case,¹ it is said of the *quod permittat*: "But against him who did the wrong it lies without any request made, for the law doth not require any request to be made to him who doth the wrong himself." In *Rosewell v. Prior*,² a tenant for years erected a nuisance by darkening the ancient lights adjoining, and then underlet the premises, and it was held that the action lay against either him or the under tenant.

§ 389. In *Mason v. Shrewsbury Railway Co.*,³ the principle of the former case was extended to a conveyance in fee. A railway company was authorized to discontinue and fill up a canal. In so doing they made a cut into its bank and returned a supply of water formerly feeding it to the brook from which it was taken. The company then conveyed the land on which the cut was made to a purchaser in fee. The changes in the course of the water caused injury to the plaintiff's premises during a flood. It was held for other reasons that the action would not lie, but the judges agreed that the fact that the defendants had parted with the property would not have affected their liability. In *Plumer v. Harper*,⁴ more than forty years before the English case above, it was contended in argument that the rule was confined to cases of leases, but the court said it would be difficult to find a good reason why the original wrong-doer should be discharged by conveying the land, and denied the distinction. The later New Hampshire cases⁵ lay down the principle without limitation that the wrong-doer continues liable notwithstanding his alienation; and in a late Massa-

Rosewell v. Prior, 2 Salk. 460; 1 Ld. Raym. 713; 12 Mod. 635; *Mason v. Shrewsbury Railway Co.*, L. R. 6 Q. B. 578; *Plumer v. Harper*, 3 N. H. 88, 92; *Woodman v. Tufts*, 9 N. H. 88; *Curtice v. Thompson*, 19 N. H. 471; *Eastman v. Amoskeag Manuf.* 44 N. H. 143; *Prentiss v. Wood*, 132 Mass. 486; *Hughes v. Mung*, 3 H. & McHen. 441; *Derman v. Ames*, 12 Minn. 451.

¹ 5 Rep. 100*b*; *Rosewell v. Prior*, *supra*; 3 Dane Abr. 57; *Conhocton*

Stone Co. v. Buffalo Railroad Co., 52 Barb. 390. For cases affirming the landlord's continued liability, but not affecting watercourses, see *Christian Smith's case*, Sir Wm. Jones, 272; *Todd v. Flight*, 9 C. B. n. s. 377; *Rex v. Pedley*, 1 A. & E. 822.

² 2 Salk. 460; 1 Ld. Raym. 713; 12 Mod. 635.

³ L. R. 6 Q. B. 578.

⁴ 3 N. H. 88.

⁵ *Woodman v. Tufts*, 9 N. H. 88; *Curtice v. Thompson*, 19 N. H. 471;

chusetts case it is held that a mill-owner, whose mill is injured by a dam erected and kept up without right, may maintain an action against the person who erected it, for injuries sustained after the wrong-doer has conveyed the dam to a third person.¹

§ 390. In New York the law is different. In *Blunt v. Aikin*,² it was held that one erecting a dam was not liable

Eastman v. Amoskeag Manuf. Co., 44 N. H. 143.

¹ *Prentiss v. Wood*, 132 Mass. 486. The decision in *Wendell v. Pratt*, 12 Allen, 464, is not inconsistent with this rule. There A. owned land on both sides of a highway. A stream flowed through his land and crossed the highway through a culvert of sufficient size, at all seasons. B., under a contract with A., for the purchase of a mill privilege, dammed the stream on the upper side of the highway, making the dam lower at the culvert, and putting in flash boards, by which this aperture could be opened or closed. B. never completed his title under the contract, and A. afterwards conveyed the land, mill, and dam to others. A freshet afterwards came, while the flash boards were on, and the gate closed, and broke down the dam and washed away the highway, for which the town sued A. and B. and A.'s grantees. It was held that if B. built the dam unskilfully, A. was not liable; that if the injury was caused by closing the gate, neither A. nor B. was liable; and that if the dam was built unskilfully or negligently, or had become ruinous, the grantees by using it would be liable for damages sustained by its breaking away in consequence of such defect. *Chapman, J.*, in speaking of the conveyance by A., said: "It does not appear that it had ever, up to that time, been so obstructed as to do any private damage to the plaintiffs. This was not, therefore, such a case as that of *Roswell v. Prior*,

12 Mod. 635, where one erected a private nuisance on land, and then assigned the land with the nuisance existing upon it. B. had abandoned the premises still earlier; and neither of them could be liable for what might be unlawfully done at a subsequent time by later owners or occupants." In *Dorman v. Ames*, 12 Minn. 451, 458 (a flowage case), the court said: "The erection of the obstruction is sufficient to constitute a liability, and the disposition of his interest subsequently, if it were established, would not defeat the action for damages arising from a nuisance erected by him." A recent Connecticut case seems to depart from the rule in the text. A landowner had covered a stream flowing through his land, and diminished its channel; and the city in which the land was situated had afterwards taken steps toward converting the stream into a sewer. The court said: "If the defendant had surrendered the possession and control of it to the city, in the belief that the proceedings of the city were regular and complete, and the city had taken such possession and control in that belief, the defendant would clearly no longer be liable for its insufficiency; in other words, he would no longer be maintaining a nuisance. The city alone would be responsible for any further damage." *Sellick v. Hall*, 47 Conn. 260. It is to be noticed that in that case the city proceeded to commit a new nuisance by wrongfully increasing the volume of the stream.

² 15 Wend. 521.

for damages caused by its continuance after he had left the possession of the premises, and others had assumed it, when there was no evidence that they held as tenants in common of such former owner. This was modified in *Waggoner v. Jermaine*,¹ and the rule given that if a person erects a nuisance upon his own lands, as by obstructing a water-course, and then conveys his premises to another with warranty, he remains liable for damages caused by the continuance of the nuisance after the conveyance. The warranty of the land as then used is taken as an upholding of the nuisance. In *Mayor of Albany v. Cunliff*,² the rule is thus stated: that "a party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land. But it is only where he continues to derive a benefit from the nuisance, as by demising the premises and receiving rent, or where he conveys the property with covenants for the continuance of the nuisance." This is followed in *Hanse v. Cowing*,³ and the rule in *Blunt v. Aikin*, with the foregoing modifications, affirmed.

§ 391. Generally the landlord is not liable for nuisances created by the tenant during his tenancy,⁴ but may become so if he relets the premises with the nuisance continuing; or if after the creation of the nuisance, and before the damage caused, he might have put an end to the tenancy and did

¹ 3 Den. 306.

² 2 Comst. 165, 174.

³ 1 Lans. 288. See, also, *Walsh v. Mead*, 8 Hun, 387.

⁴ *Woodfall, Landlord and Tenant* (11th ed.), 690; *Wood, Landlord and Tenant*, § 539; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Jansen v. Varnum*, 89 Ill. 100; *Harris v. Cohen* (Mich. Sup. Ct.) 15 N. W. Rep. 433. A declaration charging the defendant with the duty of cleansing drains, merely as owner and proprietor thereof, is bad. *Russell v. Shenton*, 3 Q. B. (A. & E. N. S.) 449. The same rule is applied in *Carter v. Berlin Mills Co.*,

58 N. H. 52, cited in 19 Alb. L. J. 3, where the defendants owned a water-power, of which third persons obtained the use under a contract; and the defendants were held not liable for damages caused by the negligent use of the power by the third persons. If a married woman owns land, and it is occupied by a tenant, or cultivated by her husband, and either of them erects a dam thereon, or digs a ditch, so as to overflow the land of another, she will not be liable unless the act was done under her direction or with her approval, or she knowingly maintained it. *Jansen v. Varnum*, 89 Ill. 100.

not (which is equivalent to a reletting¹); or if he retains control of that part of the property in which the nuisance is caused.² In the case of nuisances from the non-repair of the premises, if the landlord takes from the tenant a covenant to repair, he is not liable, since he does not authorize the continuance of the nuisance.³

§ 392. The person occupying the premises is, for the same reason, liable for the continuance of a nuisance created before his occupancy.⁴ But the continuance must be with knowledge of the nuisance. Such knowledge will not be presumed,

¹ *Rex v. Pidley*, 1 A. & E. 822; *Gandy v. Jubber*, 5 B. & S. 78, 485; 33 L. J. Q. B. 151. And see *Dicey on Parties*, 422.

² *Shipley v. Fifty Associates*, 101 Mass. 251; *Marshall v. Cohen*, 44 Ga. 489; *Brown v. Bussell*, L. R. 3 Q. B. 251, 261. In the latter case the landlord retained control of a drain which became a nuisance from the tenant's use of it.

³ *Pretty v. Bickmore*, L. R. 8 C. P. 401; affirmed (in case of coal shoot) L. R. 10 C. P. 658. And see *Gandy v. Jubber*, 5 B. & S. 78, 485. In *Preston v. Norfolk Railway Co.*, 2 H. & N. 735, the Norfolk Railway Company owned a canal and lock, for navigation, and transferred to the Eastern Counties Railway Company the exclusive possession, use, enjoyment, and receipt of all property, rights, rates, etc., therein, and the latter company agreed to repair and keep up the works at all times. The gates and lock were out of repair at the time of the transfer, and after the Eastern Counties Company took possession, large quantities of water escaped and were diverted from the stream to the injury of the plaintiff. *Pollock, C. B.*, held that the Norfolk Company was not liable, and that the Eastern Counties Company was, on the ground that the latter company had possession at the time of the

diversion. The covenant to repair was not alluded to. The decision may be supported on the ground that the canal and lock had not become a nuisance at the time of the transfer, for there is no law against letting a tumble-down house, or property out of repair. *Robbins v. Jones*, 15 C. B. N. S. 221, 240. And the covenant to repair would have the effect of discharging the transferrer. Where a contractor erected piles in a river, and, after completing his work, sold the piles which his vendees cut off and removed, leaving stumps which became a nuisance, the contractor was held not liable. *Bartlett v. Barker*, 3 H. & C. 153. Where the lease contemplates or authorizes a nuisance, the landlord is liable. *Harris v. James*, 45 L. J. Q. B. N. S. 661.

⁴ In *Beswick v. Combdon*, F. Moore, 353; Cro. Eliz. 402. A feoffee was held liable for maintaining a bank in a stream, which caused an overflow of another's land. At a later hearing of this case it was held no offence for the feoffee to maintain the bank as he found it. Cro. Eliz. 520. But this is no longer law. In a case where the defendant's husband in his lifetime diverted a watercourse from the plaintiff's house, and after her husband's death the defendant continued the diversion, she was held liable in case. *Moore v. Dame Browne, Dyer*, 319b.

and an action cannot be maintained against him until he has been notified of the existence of the nuisance, and requested to abate it.¹ He may rightfully suppose that the property has been lawfully used in the past, and may use it as it was used when purchased until objection is made. The Supreme Court of Connecticut say: The purchaser "might be subjected to great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot easily be known except to the party injured. A plaintiff ought not to rest in silence, and finally surprise an unsuspecting purchaser by an action for damages; but should be presumed to acquiesce until he requests a removal of the nuisance."²

§ 393. The form of the notice is immaterial, provided its character is clear and unmistakable.³ In *Woodman v. Tufts*,⁴ a letter of remonstrance was held sufficient, and the court say: "No particular form of words is required. The person continuing a nuisance should be so far apprized of the injury done, and of the claim made for redress, as not to be taken by surprise, and subjected to unnecessary costs by the commencement of a suit against him." In *Carleton v. Redington*,⁵ the court say: "It may be written or verbal, or by acts clearly giving the party notice of the claim for a removal of

¹ *Penruddock's Case*, 5 Rep. 101 a; *Nichols v. Boston*, 98 Mass. 39; *Dodge v. Stacy*, 39 Vt. 558, at 577; *Howe Scale Co. v. Terry*, 47 Vt. 109, 124; *Greenbank, Willes* at 583; *Salmon v. Morris Canal Co. v. Ryerson*, 27 N. J. L. 457. See 2 Saund Pl. & Ev. 464; 1 Chit. Pl. 95. In *Hughes v. Mung*, 3 Har. & McH. (Md.) 441, it was held that the alienee would be liable for doing any act to continue the diversion.

² *Johnson v. Lewis*, 13 Conn. 303, 307.

³ *Woodman v. Tufts*, 9 N. H. 88; *Carleton v. Redington*, 21 N. H. 291; *McDonough v. Gilman*, 3 Allen, 264.

⁴ 9 N. H. 92.

⁵ 21 N. H. 311.

Brent v. Haddon, Cro. Jac. 555; *Tomlin v. Fuller*, 1 Mod. 27; *Winsmore v. Bensley, Ry. & M.* 189; *Jones v. Williams*, 11 M. & W. 176; *Plumer v. Harper*, 3 N. H. 88; *Woodman v. Tufts*, 9 N. H. 88; *Curtice v. Thompson*, 19 N. H. 471; *Carleton v. Redington*, 21 N. H. 291; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *Johnson v. Lewis*, 13 Conn. 303; *Branch v. Doane*, 17 Conn. 402; *Noyes v. Stillman*, 24 Conn. 15; *Pierson v. Glean*, 2 Green (N. J.) 36; *Beavers v. Trimmer*, 25 N. J. L. 97; *Pillsbury v. Moore*, 44 Maine, 154; *McDonough v. Gilman*, 3 Allen, 264;

the nuisance." Such a notice to a municipal corporation, as a grantee continuing a nuisance, must be served upon the proper officer, and in *Nichols v. Boston*, it was held that the mayor was the proper officer, and that a notice given to the clerk was insufficient.¹ In *Tomlin v. Fuller*,² it was held that the lack of notice was cured by a verdict, where the objection was not taken until after verdict obtained. In *Salmon v. Bensley*,³ it was held that a notice left at the premises was evidence of knowledge, as against a subsequent occupier; but in *Nichols v. Boston*,⁴ it was held that a judgment against the grantor for a nuisance, existing a year previous, was no evidence of knowledge of its continuance.

§ 394. In New York the rule has varied somewhat. The later decisions hold that a purchaser of property, upon which there is a nuisance, must be shown to have notice or knowledge of its existence before he will be liable for damages caused by its continuance, but that it is not necessary to prove a request to abate it.⁵ The rule formerly was that a purchaser who continued a nuisance was responsible for the damages caused by it, although he had not been notified to remove it, nor, it would seem, shown to have knowledge of it.⁶ In *Brown v. Cayuga Railroad Co.*,⁷ the defendants had

¹ *Nichols v. Boston*, 98 Mass. 39.

² 1 Mod. 27.

³ Ry. & Mo. 189; 21 E. C. L. 730.

⁴ 98 Mass. 39.

⁵ *Conhocton Stone Road v. Buffalo Railroad Co.*, 51 N. Y. 573. Reversing s. c. 52 Barb. 390; *Miller v. Church*, 2 T. & C. 259; s. c. 5 Hun, 342.

⁶ *Brown v. Cayuga Railroad Co.*, 12 N. Y. 486; followed in *Irvin v. Wood*, 4 Rob. 138; 51 N. Y. 224; *Conhocton Stone Road v. Buffalo Railroad Co.*, 52 Barb. 390. And see *Bellinger v. New York Central Railroad Co.*, 23 N. Y. 52; *Wasmer v. Delaware Railroad Co.*, 80 N. Y. 212.

⁷ 12 N. Y. 486. Of this it may be said that the opinion of Denio J. himself is an *obiter dictum*. He said: "If

we should be of opinion that an action on the case could not be maintained against one who has continued a nuisance erected by another, without notice to remove it having been first given, the defendants could not claim the benefit of that principle in this case, for the reason that they failed to make any such objection at the trial;" and that the case of *Rolf v. Rolf*, cited in *Penruddock's* case as agreeing with it, was one of an action on the case for the nuisance of drip. See *Beswick v. Combdcn*, F. Moore, 353. The case of *Jones v. Williams*, 11 M. & W. 176, is subject to the same limitation which he puts upon *Tomlin v. Fuller*, 1 Mod. 27, and the facts in *Salmon v. Bensley*

bought a railway and land, which included a cut in the bank of a stream. The action was for damages from the overflowing of the plaintiff's land through this cut. Denio, J., laid down the rule as above. He confined the rule in Penraddock's case to the writ of *quod permittat*; distinguished Tomlin v. Fuller as a case of denying a right of way through the defendants' land, and therefore not applying to all nuisances; relied on Salmon v. Bensley as showing that the notice need not be personal; and held that the rule in Johnson v. Lewis was not sustained by these cases, and was incorrect in principle. He made no reference to Brent v. Haddon or to Jones v. Williams.

are not given. But this doctrine of Denio J.'s opinion was opposed by the opinion of Strong, P. J., a year and a half later (1857) in Hubbard v. Russell, 24 Barb. 404. He followed the English cases, and gave the usual rule. Judge Denio's opinion was not referred to, and apparently was not brought to Judge Strong's attention, and the decision was based on the ground that a request was sufficiently proved. The question was again brought before the court of appeals in the case of Conhocton Stone Road v. Buffalo Railroad Co., 51 N. Y. 573, reversing s. c. 52 Barb. 390. The cases were reviewed at length by Lott, Ch. C., the decision below reversed. Brown v. Cayuga Railroad Co. was overruled, and the rule settled as stated at the beginning of this section. It differs from the ordinary doctrine in holding that no request to abate the nuisance is necessary. This decision is noticed in Morse v. Fair Haven East, 48 Conn. 220. The action was case for a nuisance created by the town of East Haven, by the improper construction of a highway, and continued by the borough of Fair Haven East. It was found that the borough had, at the time of the transfer of liability for the highway from the town to the borough, no knowledge of the nuisance.

The Supreme Court held that it was not a case of defective highway but of nuisance, and that the borough could not be held liable in the absence of knowledge. After referring to Johnson v. Lewis, 13 Conn. 303, and the New York cases above cited, Park, C. J., said: "It is not necessary for us to consider whether such a request is necessary, as the want of knowledge is decisive of the present case." The New York doctrine is followed in Pinney v. Berry, 61 Mo. 359; Dickson v. Central Pacific Railroad Co., 71 Mo. 575; Wayland v. St. Louis Railway Co., 75 Mo. 548. In the last case the court also had occasion to decide that a purchaser is not liable for either the erection or continuance of a nuisance created by his vendor upon adjoining land. A railway company had dug a ditch mainly upon its own land, connecting a lake with a river, for purposes of drainage; but the discharge into the river was upon the land of another. The water, when high, flowed backward from the river, and overflowed adjoining land; and the overflow was found to be due to the construction of the discharge which was upon another person's land. A purchaser of the road was held not liable for damages caused by a subsequent overflow.

§ 395. If the grantee erects a new nuisance upon his premises, he is an original wrong-doer and not entitled to notice.¹ Such new nuisance may be created by a new use of existing structures, as by increasing the height of a dam,² or by using flash-boards, which were formerly used in a proper manner, in such a way as to raise the water to a greater height than he had a lawful right to raise it;³ or by keeping closed the gates in a dam, which have been habitually kept open, where-by water is diverted from the plaintiff.⁴

§ 396. It is a general rule that one, any, or all of several joint wrong-doers may be sued.⁵ In other words, the liability for torts is both joint and several, and every person who joins in committing a tort is separately liable therefor, and cannot escape his liability, or compel the joinder of other persons by showing that such others are liable also.⁶ But this rule is modified where the cause of action is against persons in respect of their common interest in land. Where the injury arises from the state of their land, apart from any act, the liability is simply joint, and all must be made defendants.⁷ But if the injury arises from the acts of co-tenants upon their land, the general rule applies, and any or all of the wrong-doers may be sued. Applying these rules to injuries affecting waters, it follows that for any nuisance caused by a misfeasance by co-tenants, as by wrongfully maintaining a dam or polluting a stream, the plaintiff might sue one or all of the co-tenants; but where the injury proceeds from a mere omission of the land-owners to perform their duties in respect to their land, the tort is simply joint, and all must be sued; and so the courts have held.⁸

¹ *Curtice v. Thompson*, 19 N. H. 471; *Carleton v. Redington*, 21 N. H. 291; *Snow v. Cowles*, 22 N. H. 296; *Branch v. Doane*, 17 Conn. 402; *Noyes v. Stillman*, 24 Conn. 15; *Lawson v. Price*, 45 Md. 123, 137; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457.

² *Carleton v. Redington*, 21 N. H. 291.

³ *Noyes v. Stillman*, 24 Conn. 15.

⁴ *Snow v. Cowles*, 22 N. H. 296.

⁵ *Dicey on Parties*, 430.

⁶ *Dicey on Parties*, 430; 1 *Chitty Pl.* 97, 98; *Freeman on Co-tenancy*, § 366; *ante*, § 222.

⁷ 1 *Chitty Pl.* 98; 1 *Wms. Saund.* 291 *fg.* (notes to *Cabell v. Vaughn*); 1 *Lindley on Partnership* (4th ed.), 485.

⁸ *Abbe de Stratforde's case*, Y. B. 7

§ 397. If one of two tenants in common of a mill use it to the nuisance of a stranger, the other owner not actually participating in the wrong is not liable.¹ A joint tort must

Hen. 4, p. 8, case 10; *Sutton v. Clarke* 6 Taunt. 29; *Low v. Mumford*, 14 Johns. 426; *Simpson v. Seavey*, 8 Greenl. 138; *Southard v. Hill*, 44 Maine, 92; *Sumner v. Tileston*, 4 Pick. 308. And see *Converse v. Symmes*, 10 Mass. 377. In the *Abbe de Stratforde's* case (7 Hen. 4, p. 8, case 10), an action of trespass on the case was brought against him, and the plaintiff averred that the defendant held certain land, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall his meadows were drowned. To which Skrene said: "It may be that the abbot had nothing in the land by cause whereof he should be charged, but jointly with another," "in which case the one cannot answer without the other." In *Sutton v. Clarke*, 6 Taunt. 29, the suit was against the chairman of a board of trustees of a turnpike, who had caused a trench to be cut in the road, whereby the plaintiff's land was overflowed. It was held that the other members of the board need not be joined. *Low v. Mumford*, 14 Johns. 426, was an action for keeping up a mill-dam on the Susquehanna River below the plaintiff's land, and causing the water to overflow it. The defendant pleaded in abatement that he held the lands on which the mill-dam was erected in joint tenancy with other persons who were not made parties. The court above held the joinder unnecessary. Platt, J., in speaking of the *Abbe de Stratforde's* case, said: "The gist of the action, therefore, was that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land on which the nuisance existed was, therefore, directly in question; for, if the abbot

was not the owner of the land, he was not chargeable with neglect nor liable for the nuisance. But in this case the action is for a nuisance arising from an act of misfeasance, 'the keeping up' a mill-dam on a stream below the plaintiff's land." The title to that land cannot come in question in this suit, for the maintaining such a dam is equally a nuisance, and the defendants are equally liable for damages whether the defendants own the land as joint tenants with others, or whether they are sole proprietors, or whether they have any right whatever in it." "Unless the title comes in question, there is no difference in this respect, in cases arising *ex delicto* between actions merely personal and those which concern the realty." *Sumner v. Tileston*, 4 Pick. 308, was an action against three defendants for erecting a dam, by means whereof the plaintiff's mills were obstructed. Two of the defendants pleaded in abatement the death of the third, pending the suit; but the pleas were held ill, as the action was simply *ex delicto*, and it did not appear that the defendants were charged by reason of their holding real estate as co-tenants. In *Converse v. Symmes*, 10 Mass. 377, which was also for maintaining a dam and flooding land, the non-joinder of a tenant in common was pleaded in bar, and it was held matter only for abatement.

¹ *Simpson v. Seavey*, 8 Greenl. 138. In this case four persons owned a saw-mill, and three of them erected a lath-mill inside the saw-mill, for their separate use, the rubbish thrown from which obstructed the mills below. It was held, in an action on the case against all the owners of the saw-mill for this injury, that the fourth owner, having no interest in the lath-mill or occupancy thereof, was not liable.

arise out of a single and joint act, and immediate juxtaposition of different acts will not make a tort joint. Where a land-owner had covered a stream flowing through his land, and had used the stream as a sewer, and increased the volume of water in the stream, it was held that they could not be made jointly liable; and that the fact that the effects of their several wrongful acts were produced at the same time and place did not affect the question of liability, but only of damages.¹

§ 398. Where the injury complained of results from the separate acts of many persons, any one contributing to produce the injury is separately liable for the injury which he causes.² So where the flow of a stream was obstructed by several distinct causes, and water was thrown back upon the plaintiff's premises, the court said: "If the injury is produced by the joint action of several parties, and especially if it is the result of the independent action of several parties contributing thereto, though not in combination or by concert, it is no defence that all are not made defendants"; but that fact "can be considered only upon the question of damages."³

§ 399. It is not necessary that one should be the owner or even occupier of the freehold in order to become liable for erecting a nuisance, and on the other hand the owner is not liable for nuisances erected on his land without his consent. In *Dorman v. Ames*,⁴ the court said: "It is not necessary in an action of this nature that a person charged with erecting the nuisance should be the owner of the freehold, or any part of it upon which the dam is erected; it is sufficient if he is a party to the erection of the obstruction claimed to be a nuisance." In *Saxby v. Manchester*

¹ *Sellick v. Hall*, 47 Conn. 260.

² *Wheeler v. Worcester*, 10 Allen, 591; *Chipman v. Palmer*, 9 Hun, 517; s. c. 77 N. Y. 51; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Arimond v. Green Bay*, 35 Wis. 41; *Hill v. Smith*, 32 Cal. 166; *Keyes v. Little York Gold Washing & Water Co.*, 53

Cal. 724; *Little Schuylkill Nav. Co. v. Richards*, 53 Penn. St. 142; *Gladfelter v. Walker*, 40 Md. 1; *Buccleuch v. Cowan*, 5 Macph. Sc. Sess. Cas. (3rd ser.), 214.

³ *Wheeler v. Worcester*, 10 Allen, 591.

⁴ *Dorman v. Ames*, 12 Minn. 451, 456.

Railway Co.,¹ the defendants were owners of the soil of a stream which supplied water to two print works, both of which had formerly been occupied by A., who had erected a weir across the stream and diverted water from one of the works to supply the other. The plaintiff, becoming lessee of the former works and entitled to the water from the stream, removed the weir, which was shortly afterwards replaced by A., as it was supposed, but without the authority of the defendants. The court held that they were not responsible for the acts of A., or for the continuance of the nuisance. So one does not become a party to the wrong by deriving benefit from it. If a mill-owner increases the height of the stream, and in so doing wrongfully flows the lands above, another mill-owner who derives benefit from the increase, but who contributes to it in no way, is not liable for the flowage to those who are injured thereby. But if he pays anything for the benefit which he enjoys, he will be liable for the injury caused by the wrong done in producing that benefit.²

§ 400. At common law an action to recover damages sustained from diversion, obstruction, or flowage, caused by the defendant's wrongful acts, died with the defendant. But this has been changed by statute in several of the States.³

§ 401. It was at one time doubted whether case could be maintained for a nuisance which caused no actual damage to the plaintiff; but the rule is well settled both in England and America, that for any nuisance which infringes upon the rights of the plaintiff, or which would abridge his present or potential use of his property, the action will lie, although it causes no present actual damage.⁴

¹ L. R. 4 C. P. 198.

² *Tourtellot v. Phelps*, 4 Gray, 370, 376.

³ *Ten Eyck v. Runk*, 31 N. J. L. 428.

⁴ *Ante*, § 214. A statement in Britton (written about 1300 A.D.)

gives a rule apparently contrary to that above. In Bk. II., c. 30, § 2, 154 (1 Nichols's ed. 398), Britton says: "Of nuisances, however, some are both tortious and hurtful, others hurtful, yet not tortious; therefore, it

§ 402. The case usually treated as the leading case is *Duncombe v. Randall*,¹ where it is said: "If one had anciently ponds which are replenished by channels out of a river, he cannot change the channels if any prejudice accrew to another by that." In *Westbury v. Pond*, cited in *Fineux v. Hovenden*,² it was held that one of a body of people entitled to a common watering-place, which the defendant obstructed, might bring an action on the case, although there was no actual and particular damage to the plaintiff. The principal English authorities by which the doctrine opposed to that given above is seemingly supported, are *Williams v. Morland*,³ *Wright v. Howard*,⁴ and *Miner v. Gilmour*.⁵ In *Williams v. Morland* the case was for diverting a stream by a dam, and, it was alleged, causing injury to the plaintiff's land. The jury found that the plaintiff was uninjured, but that the defendant had no right to stop the water. The judges all used language seemingly opposed to the rule. *Holroyd, J.*, said: "The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should show the loss of some benefit, or the deterioration of the value of the premises." But the ground of the decision was that no such damage as that alleged was shown. In *Wright v. Howard*, Vice Chancellor Sir John Leach, in deciding upon a bill for specific performance of a contract to purchase land with water-rights, and to which there was a cross bill for cancellation, remarks *obiter*: "It appears to me that no action will lie for diverting or throwing back water except by a person who sustains an actual injury." But the distinction between actual injury and actual

behoves every plaintiff in this case to show what damage is occasioned to him by the nuisance." This is almost a copy from Bracton (Bk. 4, c. 43); but the important clause in this connection is wanting. And Britton continues: "And if the nuisance be found to be both hurtful and tortious, then matters are to be entirely restored to their former condition. If

not tortious, it must be tolerated, however hurtful it may be"; which seems to indicate that damage was used more in the sense of injury.

¹ Hetley, 34.

² Cro. Eliz. 664.

³ 2 B. & C. 910; s. c. 4 Dow. & Ry. 583.

⁴ 1 Sim. & Stu. 190, 203.

⁵ 12 Moo. P. C. 131, 156.

damage must be observed. In *Miner v. Gilmour*,¹ the privy council were called upon to determine the rights of riparian owners. Lord Kingsdown, in delivering the opinion, said: "But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." We shall hereafter notice the application of the rule to the rights of adjacent riparian owners. In *Mason v. Hill*,² Denman, C. J., reviewed several of these cases, but declined to pass on the point. He said: "It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water without a special use or special damage shown." He referred to *Palmer v. Keblethwaite*,³ and *Glynne v. Nichols*,⁴ where the question was raised, but not decided. In the latter case it was adjudged for the plaintiff. But the report in *Comberbach* shows that this was a case of trespass, and therefore not in point.

§ 403. The later English cases place the rule beyond a doubt. In *Rochdale Canal Co. v. King*,⁵ the defendants, who owned a mill adjacent to a canal, were authorized by Act of Parliament to draw water from the canal for the sole purpose of condensing steam used in their engines. It was found at the trial that they had been drawing the water for other purposes, but that they had not thereby obstructed the navigation. The court held that the action would lie. Coleridge, J., said: "The water then having been used by the defendants for illegal purposes, the general principle applies, that although no appreciable damage may be sustained in the particular instance by the wrongful act, yet as the repetition of such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has already been sustained, in respect of which an action is maintainable." In *Wood v. Waud*,⁶ the defendants fouled a stream without rendering the water less available for useful purposes than

¹ 12 Moo. P. C. 131, 156. But see article in 12 Jur. N. S. (1866) 359.

² 5 B. & Ad. 1, 27.

³ 1 Show. 64; s. c. *Skinner*, 65.

⁴ 2 Show. 507; *Comberbach*, 43.

⁵ 14 Q. B. 122, 134.

⁶ 3 Exch. 748, 772.

before. Pollock, C. B., in delivering the opinion, said: "We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land in its natural state." This is a case, therefore, of an injury to a *right*. The defendants by continuing the practice for twenty years might establish the right to the easement of discharging into the stream the foul water from their works."

§ 404. In *Embrey v. Owen*,¹ which was a suit by a lower riparian proprietor against an upper one for abstracting water, and to which we shall again refer, Parke, B., says: "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable." This was followed in *Northam v. Hurley*.² In *Harrop v. Hirst*,³ the court held that an action for diverting water is maintainable without proof of any actual personal damage. Martin, B., said: "The test is whether the doing of the acts complained of would, if continued, bar another person's legal right." So the drawing of a seine in the several fishery of another, although no fish are taken, entitles the latter to damages, on the ground that a repetition of such act for the required time would divest the proprietor of his rights.⁴

§ 405. In America, the rule that the action on the case lies for any nuisance infringing the plaintiff's right, although there is no actual damage, is sustained by an almost un-

¹ 6 Exch. 353, 368.

² 1 E. & B. 665.

³ L. R. 4 Exch. 43, 45. The same doctrine is followed in *Rose v. Groves*, 5 M. & G. 613; *Bower v. Hill*, 1 Bing. (N. C.) 549; *Sampson v. Hoddinott*, 2 C. B. N. s. 590; *Medway v. Romney*, 9 C. B. N. s. 575; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Bickett v. Morris* (*per* Lord Westbury) L. R. 1 H. L. (Sc. & Div. Ap.) 47; 14 L. T. N. s. 835 (explained in *Ewing v. Colquhoun*, L. R. 2 App. Cas. 839); *Lyon v. Fishmongers Co.*, L. R. 19 Ch.

679; 1 App. Cas. 662; *Claxton v. Claxton*, Ir. Rep. 7 Com. L. (1873) 23. To same effect see 1 Wms. Saund. 346 *b* (note to *Mellor v. Spateman*); 2 Notes to Saund. 370; *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125. And see *Pennington v. Brinsop Co.*, 5 Ch. D. 769, where Fry, J., distinguishes the term "injury" from "damage."

⁴ *Patrick v. Greenway*, 1 Wm. Saund. 346 *b*; 1 Notes to Saund. 627. And see *Chapman v. Thames Manuf. Co.*, 13 Corn. 269, 274.

broken series of authorities.¹ In *Woodman v. Tufts*,² decided in 1837, before most of the English cases above cited, the defendants maintained a dam which caused the water to flow back upon the plaintiffs' land. It was insisted on the part of the defendants that the overflowing had occasioned no actual damage after the plaintiffs became the owners, but the court ruled that if the defendants without right maintained a dam so high as to overflow the land of the plaintiffs, the presumption of law was that the act was a damage, and no special damage need be shown in order to maintain the action, and this ruling was sustained above. In *Webb v. Portland Manuf. Co.*,³ which was an equity case between riparian proprietors, Story, J., lays down the rule which is followed by Parke, B., in *Embrey v. Owen*, above cited, who quoted almost the words of Story. In *Tillotson v. Smith*,⁴ the defendant increased the head of water in his pond by turning into it another stream, thereby increasing the volume of water flowing over the land of the plaintiff below. The court say: "It is a long established principle of the common law, that wherever any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury." Similar language is used in nearly all the cases above cited. So where the

¹ *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Whipple v. Cumberland Manuf. Co.*, 2 Story, 661; *Chapman v. Thames Manuf. Co.*, 13 Conn. 269; *Parker v. Griswold*, 17 Conn. 288; *Branch v. Doane*, 18 Conn. 233; *Newhall v. Ireson*, 8 Cush. 595; *Stowell v. Lincoln*, 11 Gray, 434; *Blanchard v. Baker*, 8 Maine, 253; *Bateman v. Hussey*, 12 Maine, 407; *Munroe v. Stickney*, 48 Maine, 462; *Woodman v. Tufts*, 9 N. H. 88; *Cowles v. Kidder*, 24 N. H. 364, 379; *Bassett v. Salisbury Manuf. Co.*, 28 N. H. 438; *Gerish v. New Market Manuf. Co.*, 30 N. H. 479, 484; *Tillotson v. Smith*, 32 N. H. 90; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Chatfield v.*

Wilson, 27 Vt. 670; *Tuthill v. Scott*, 43 Vt. 525; *Plumleigh v. Dawson*, 1 Gilman, 544; *Hulme v. Shreve*, 3 Green. Ch. 116; *Pastorius v. Fisher*, 1 Rawle, 27; *Ripka v. Sergeant*, 7 Watts. & S. 11; *Miller v. Miller*, 9 Penn. St. 74; *Delaware Canal Co. v. Torrey*, 33 Penn. St. 143; *Graver v. Sholl*, 42 Penn. St. 58; *Stein v. Burden*, 42 Ala. 130; *Tootle v. Clifton*, 22 Ohio St. 274; *Mitchell v. Barry*, 26 Up. Can. Q. B. 416; *Hendrick v. Cook*, 4 Ga. 241; *Chapman v. Cope-land*, 55 Miss. 476; *Essen v. McMaster*, 1 Kerr (N. B.) 501.

² 9 N. H. 88.

³ 3 Sumner, 189.

⁴ 32 N. H. 90, 96.

owners of an ancient mill upon a lake, who had been accustomed for many years to obtain water for their mill through an artificial channel which they maintained in a sand-bar, thereby obtained a prescriptive right to overflow the adjoining lands to a certain height, and afterwards placed a conduit in the sand-bar which admitted more water and overflowed the adjoining lands to a greater height, it was held that the adjoining owner could maintain an action, although the gradual filling of the ancient channel would have raised the water to the same height.¹

§ 406. The distinction between the proper use of the stream by a riparian owner, which infringes no right of the other proprietors, although it necessarily modifies the stream in some way, and a use which infringes their rights, although causing no damage, is important. This topic involves the discussion of questions of substantive law which have already been considered,² but it is so intimately connected with the subject in hand that it must be referred to here. When does the riparian owner's use of the stream cease to be rightful and become a nuisance? What uses of the stream are *per se* infringements of the adjacent owner's rights? The answers to these questions doubtless explain the apparent conflict of authorities.

§ 407. The law of England on the point was settled by the opinion of Baron Parke in the case of *Embrey v. Owen*.³ He states the right of the riparian owner to the flow of the stream in its natural state, without diminution or alteration, and then adds: This "is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable; but it is a right only to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side, to the reasonable enjoyment of the

¹ *Chapman v. Thames Manuf. Co.*,
13 Conn. 260.

² *Ante*, c. 7.

³ 6 Exch. 353.

same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use it will; even as the case above cited from the American reports shows (*Webb v. Portland Manuf. Co.*), though there may be no actual damage to the plaintiff." In the still earlier case of *Tyler v. Wilkinson*,¹ Story, J., uses similar language, saying: "When I speak of this common right I do not mean to be understood as holding the doctrine that there can be no diminution whatever, and no obstruction or impediment whatsoever by a riparian proprietor in the use of the water as it flows; for that would be to deny any valuable use of it. There may be and there must be allowed of that which is common to all, a reasonable use." "There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all."

§ 408. The correct answers to the above questions are indicated by these opinions, and the true rule is clearly stated in the case of *Wheatley v. Chrisman*.² There a small stream of water flowed through the land of the parties, the defendant being the upper and the plaintiff the lower proprietor. The plaintiff complained that the defendant, who was working a lead-mine, had corrupted the water, and sensibly diminished the volume of the stream. Black, J., in delivering the opinion of the court, said: "If either of these allegations be true the plaintiff has a right to recover in this action; and if one verdict be not enough to make the defendant discontinue the nuisance, a second jury will be instructed to give such damages as will cause him to wish that he had taken the warning of the first. The wrong must cease, no matter how trifling it may seem. The right of the

¹ 4 Mason, 397, 401 (1827).

² 24 Penn. St. 298, 302.

plaintiff is absolute to be restored to the full enjoyment of his own property, and is not dependent in any manner upon its value either to himself or his adversary." "The proposition of the defendant was that he had a legal right to use a reasonable quantity of the water for the purposes of his business. The court replied that his business might reasonably require more than he could take consistently with the rights of the plaintiff. We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity, or corrupting it in quality. If he needed more, he was bound to buy it."¹

§ 409. In *Dumont v. Kellogg*,² the same question came up between upper and lower riparian owners. The upper proprietor, by filling a reservoir from a stream, had diminished its volume. Cooley, J., in delivering the opinion of the court, said: "In considering the case it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from a proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. It differs also from the case of an interference by a stranger, who by any means, or for any cause, diminishes the flow of the water; for this also is wholly wrongful, and no question of the reasonableness of his action in causing the diminution can possibly arise." "But as between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one 'has no right to use the water to the prejudice of the proprietor below him,' or that he cannot

¹ The language of this case is adopted by Professor Washburn in his treatise on Easements, p. 266, and is followed in *Batavia Manuf. Co. v. Newton Manuf. Co.*, 91 Ill. 230, 245; and *Garwood v. New York Central Railroad Co.*, 17 Hun, 356.

² 29 Mich. 420, 422, 425.

lawfully 'diminish the quantity which would descend to the proprietor below.'” “Such a rule would be in effect this: that the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.” “There may be, and there must be, allowed of that which is common to all a reasonable use by each.” “The injury that is incidental to a reasonable enjoyment of the common right can demand no redress.” Mr. Phear, in his treatise on Waters,¹ says: “Of course no action will lie either in trespass or nuisance, unless a right be infringed; but if the infringement be proved, nominal damages must be awarded, whether actual damage were a consequence or not. In cases where the right alleged to be infringed is merely the right to be protected from actual damage, manifestly no action can succeed, unless actual damage be proved.”²

§ 410. In *Elliot v. Fitchburg Railroad Co.*,³ a railroad company, owning land along a stream, had dammed it to obtain water for their locomotives. It was held that a lower riparian proprietor could not maintain case unless he had suffered actual and perceptible damage. Shaw, C. J., said: “The gravamen of the complaint is not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question, therefore, was, whether in the mode of taking, in the quantity taken,

¹ P. 107.

² This is somewhat inaccurate of trespass, since every trespass imports damage. 3 Bl. Com. 209. For further discussion of the doctrine stated in the text, see 1 Smith's Lead. Cas., notes to *Ashby v. White*. The dis-

inction is stated, but less clearly, in *Miner v. Gilmour*, 12 Moo. P. C. 131, upon which see an important article in 12 Jur. N. S. (1866) p. 359. And see *Snow v. Cowles*, 22 N. H. 86.

³ 10 Cush. 191, 197. See Bigelow's Leading Cases on Torts, 509.

and the purpose for which it there was taken, was a reasonable and justifiable use of the water by Clark.¹ The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff." It will be seen that he distinguishes the case from the typical one by which the plaintiff resists an infringement, which may ripen into an adverse right, or abridge or bar the plaintiff's right. That this is not in conflict with the rule, that the action lies in the latter case, may be inferred from the opinion of the same learned judge in *Newhall v. Ireson*.² There the upper proprietor had conveyed water by a pipe to his well upon another tract of land, wholly away from the stream, and returned it into the salt water below the plaintiff's land. Shaw, C. J., says: "This substantial diversion of the water-course, therefore, was unwarranted by any rights of the defendants as proprietors above, was an encroachment on the rights of the plaintiff, and prejudicial to her estate. And, although the plaintiff has sustained no present damage because she has had no mill upon it, or otherwise used it for any agricultural or manufacturing purpose, yet such diversion would prevent such beneficial use of it hereafter, and thus impair the value of the estate. It is, therefore, a case where an action can be maintained to vindicate the plaintiff's right, and to prevent a loss of it by adverse possession and lapse of time."³

¹ The defendant's grantor.

² 8 Cush. 595, 599.

³ In the case of *Cummings v. Barrett*, 10 Cush. 186, 191, Shaw, C. J., also expresses his opinion in similar terms as to cases where rights are infringed. And this rule has been followed by the same court in *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Hastings v. Livermore*, 7 Gray, 194; *Stowell v. Lincoln*, 11 Gray, 434; and *Lund v. New Bedford*, 121 Mass. 286. The doctrine of *Elliot v. Fitchburg Railroad Co.* is in accord with decisions in other States. In *McElroy v. Goble*, 6 Ohio

St. 187, it was held that the use of streams of water for domestic, agricultural, or manufacturing purposes, being to some extent a public right, an action for a nuisance caused by any obstruction or diversion of a stream for *any such purpose*, will not lie unless the damage occasioned thereby is real, material, and substantial. For other authorities, that an insensible or minute diminution, or interference with a stream by a riparian owner in the course of a proper use of the stream, not causing damage, is no infringement of other riparian proprietors' rights, and is

§ 411. The question whether damages shall be computed only up to the beginning of the action, or shall include prospective damages, is one of considerable difficulty. The general rule, stated by Mayne, is that damages arising subsequent to action brought, or even to the date of the verdict, may be taken into consideration when they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action.¹ This general principle must be applied to single nuisances, to continuing and permanent nuisances, to acts which are wrongful only when causing damage, to single trespasses and continuing trespasses, and to cases where adverse rights are acquired by the party answering in damages. For the purpose of illustrating the leading distinctions made by the courts, we have distributed these cases into several classes.

§ 412. *First.* Nuisances and acts wrongful only when causing actual damage; *i.e.*, where damage is the gravamen of the action.² In these cases, only the damages actually accrued before action brought can be recovered; and any further damage must be recovered in a separate action when it actually accrues.³ This class includes cases where the acts

not actionable, see *Wadsworth v. Tillotson*, 15 Conn. 336; *Martin v. Bigelow*, 2 Aik. (Vt.) 184; *Ford v. Whitlock*, 27 Vt. 265; *Canfield v. Andrew*, 54 Vt. 1. And cases cited *ante*, §§ 204, 214. In *Sandwich v. Great Northern Railway Co.*, 10 Ch. D. 707, the facts were very similar to those in *Elliot v. Fitchburg Railroad Co.* On a bill for an injunction Vice-Chancellor Bacon laid down the same rule, and denied the injunction. But if a railway company, as riparian owner, appropriates so much of the water as perceptibly to reduce the volume in the stream, and materially to diminish the power of a mill below, the company will be liable for all damages caused thereby. *Garwood v. New York Central Railroad Co.*, 83 N. Y. 400.

¹ Mayne's Law of Damages (3d ed.), 84.

² See *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; *Lamb v. Walker*, 3 Q. B. Div. 389 (dissenting opinion of Cockburn, C. J.); *Delaware & Raritan Canal Co. v. Wright*, 21 N. J. L. 469.

³ *Ibid.*; *Waggoner v. Jermaine*, 3 Denio, 306; *Baldwin v. Calkins*, 5 Wend. 167, 179; *Phillips v. Terry*, 42 N. Y. 313; *Whitemore v. Bischoff*, 5 Hun, 176; *Duryea v. Mayor*, 26 Hun, 120; *Beckwith v. Griswold*, 29 Barb. 291; *Thayer v. Brooks*, 17 Ohio, 489; *Polly v. McCall*, 1 Ala. Sel. Cas. 246; 37 Ala. 20; *Stein v. Burden*, 24 Ala. 130; *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; — *v. Deberry*, 1 Hayw. (N. C.) 248; *Carruthers v. Tillman*, Id. 501; *Bradley v. Amis*, 2 Id. 399; *Shaw v. Etheridge*, 3 Jones

complained of are interrupted and repeated, as in the opening and closing of the gates of a dam;¹ cases where, from a single act, not wrongful in itself, new damages result from time to time, and constitute new causes of action; and, on principle, would include all cases of nuisances, single and continuing. In *Whitehouse v. Fellowes*,² the trustees of a turnpike had converted an open ditch at the side of their road into a covered drain. In heavy storms this drain was inadequate to the carrying off of the water, and in consequence the plaintiff's lands were overflowed. Williams, J., said: "In considering the first point, I assume that an injurious act was done to the plaintiff, by reason of the defendants' improper management of the catchpits, whereby the water which ought to have passed down the drain was caused to flow into the plaintiff's pits. The question is whether the plaintiff is bound to rest his complaint upon the original construction of the works, or whether he can maintain an action after the expiration of three months from that time" (the period of a special statute of limitation). "I am of opinion that the continuance by the defendants of that negligent and improper condition of the road under their charge, if accompanied by fresh damage to the plaintiff, constitutes a fresh cause of action." "Suppose an action to have been commenced immediately after the first injury accrued to the plaintiff's pits from the flow of water down the road in question; when that cause came to be tried, the only question would be how much damage the plaintiff had actually sustained. It would be monstrous injustice to hold that the jury must assume that the defendants would persevere in

(N. C.) 300; *Burnett v. Nicholson*, 86 N. C. 99; *Duncan v. Markley*, 1 Harper (S. C.) 276; *Langford v. Owsley*, 2 Bibb (Ky.) 215; *Cobb v. Smith*, 38 Wis. 21; *Hazeltine v. Case*, 46 Wis. 391; *Dorman v. Ames*, 12 Minn. 451; *Clark v. Nevada Mining Co.*, 6 Nev. 203. See *Hodges v. Hodges*, 5 Met. 205; *McConnel v. Kibbe*, 29 Ill. 483. As to the statute of limitations, see *Sutton v. Clarke*, 6 Taunt. 29; and *Deverry v. Grand*

Canal Co., Ir. Rep. 9 C. L. 194, where it is held that in actions for damages caused by continued obstruction, the statute runs from the time the special damage complained of occurred. To the same effect see *Van Orsdol v. B. C. R. & N. R. Co.*, 56 Iowa, 470.

¹ So in case of the occasional erection of flash-boards upon a dam, causing damages from time to time. *Noyes v. Stillman*, 24 Conn. 15.

² 10 C. B. N. S. 765, 781.

their wrongful conduct, and that the damages must be assessed upon that assumption. All that the jury could do would be to find what damages the plaintiff had sustained from the wrongful act complained of, and they would be told to give him such damages as they might find he had sustained down to the time of the commencement of the action.”¹

§ 413. Most of these cases turn upon the principle that every continuance of a nuisance is a new nuisance.² In *Beckwith v. Griswold*,³ the action was for damages caused by obstructing and changing the channel of a creek and diverting its waters and causing them to overflow the plaintiff's lands. The plaintiff had already had one recovery for damages caused by the same act. The court held that the former recovery was no bar to the present action. Balcom, J., said: “The plaintiff recovered damages in the first suit for erecting and continuing the obstructions in the channel of the creek, by the defendants, to the time he commenced that suit, and he has only recovered damages in this action for continuing such obstructions from the time the first suit was commenced to the time of the commencement of this one.”⁴

§ 414. In *Duryea v. Mayor*,⁵ the action was for damages caused by the wrongful discharge of water and sewage upon the plaintiff's lands. Daniels, J., said: “As the discharges flowed from the sewer upon the plaintiff's property, they constituted a nuisance; and for that nuisance a distinct and separate action might have been brought by him for every discharge made by the sewer upon his property. Each discharge was in and of itself a substantive cause of loss, and for that reason constituting a separate right of action.” “As to wrongs of this nature, their continuance has been uniformly

¹ For similar reasoning applied to the subsidence of land, from the removal of lateral support, see the dissenting opinion of Cockburn, C. J., in *Lamb v. Walker*, 3 Q. B. Div. 389.

² 3 Bl. Com. 220.

³ *Beckwith v. Griswold*, 29 Barb. 291.

⁴ This case is cited with approval in *Munson v. People*, 5 Parker, C. C. 16. The same rule is laid down in *Bradley v. Amis*, 2 Hayw. (N. C.) 399.

⁵ *Duryea v. Mayor*, 26 Hun, 120, 122.

held to be an additional nuisance, forming of itself the subject-matter of an action, and for that reason only such damages could be recovered for the causes alleged in the complaint as the ground of action, as originated solely from that source before the commencement of the action." *Thayer v. Brooks*¹ was an action on the case for nuisance in diverting water from the plaintiff's mill by means of a ditch. The court say: "The court instructed the jury that the owner of the mill might recover for the injury sustained by the diminution in value of the mill-site, consequent upon the diversion of the water. This was going too far. Supposing the party liable at all, he was only liable, under any form of declaration, for the damages actually sustained prior to the commencement of the suit."

§ 415. If a person continues a nuisance after its wrongful character has been judicially determined, and damages have been recovered against him, the case becomes one for exemplary damages.² In a second action, the plaintiff should be awarded damages sufficient to compel the defendant to abate the nuisance.³

¹ *Thayer v. Brooks*, 17 Ohio, 489. In *Hayden v. Albee*, 20 Minn. 159, this principle is departed from. The action there was for damages to plaintiff's land resulting from an overflow caused by defendant's dam. The jury were allowed to include in the damages the value of timber caused to die by the flowage, although the timber did not die until after the action was begun. In *Hazeltine v. Case*, 46 Wis. 391, a lower riparian owner had brought one action against an owner above, for fouling the stream, and had obtained judgment from which the defendant appealed. While such appeal was pending, the plaintiff brought a second action before a justice of the peace for damages accruing since the date of the first action. It was held that the action would lie, and further that a judgment in the second action in no

way affected the rights of the parties in the first action, pending in the circuit court.

² *Bradley v. Amis*, 2 Hayw. (N. C.) 399.

³ *Ibid.* See — *v. Deberry*, 1 Hayw. 248; *Carruthers v. Tillman*, 1 Hayw. 501; *Clyde v. Clyde*, 1 Yeates, 92; *Walker v. Butz*, 1 Yeates, 574; *Mayor v. Commissioners*, 7 Penn. St. 348, 366; *Wheatley v. Chrisman*, 24 Penn. St. 298. In *Battishill v. Reed*, 18 C. B. 696, where the action was for the nuisance of overhanging eaves, *Jervis, C. J.*, said: "Every day that the defendant continues the nuisance, he renders himself liable to another action. I think the jury did right to give, as they generally do, nominal damages only in the first action; and, if the defendant persists in continuing the nuisance, then they may give such damages as may compel him to

§ 416. But the rule as to the class of cases is subject to an important modification where the injury complained of is permanent. In such cases, the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act.¹ Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, and bridges, permanent dams and permanent pollutions of water, fall in this class. The leading case of this class is *Troy v. Cheshire Railroad Co.*² This was an action on the case by a town against a railroad company for damages caused by building a railroad bridge across the public highway, obstructing the highway, and demolishing a public bridge. The plaintiff recovered and was allowed to include in its damages the prospective increased cost of maintaining the highway. In delivering the opinion of the court, Bell, J., said: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not

abate it, but not, as was insisted here, the difference between the original value of the premises and their present diminished value." In Delaware, by statute, the owner of an upper mill is bound to give notice to the owner of a lower mill before discharging an unusual quantity of water, and if he wilfully discharges water in an unusual quantity, he is liable for double damages. *McIlvane v. Marshall*, 3 Har. (Del.) 1; *Ross v. Horsey*, 3 Har. (Del.) 60.

¹ *Troy v. Cheshire Railroad Co.*, 23 N. H. 83; *Warner v. Bacon*, 8 Gray,

397; *Fowle v. New Haven & Northampton Co.*, 107 Mass. 352; 112 Mass. 334; *Powers v. Council Bluffs*, 45 Ia. 654; *Chicago & Alton Railroad Co. v. Maher*, 91 Ill. 312; *Van Schoick v. Delaware & Raritan Canal Co.*, 20 N. J. L. 249; *Seely v. Alden*, 61 Penn. St. 302; *Van Orsdol v. B. C. R. & N. R. Co.*, 56 Iowa, 470.

² *Troy v. Cheshire Railroad Co.*, 23 N. H. 83. For a suggestion of the convenience of one action instead of several, see *Duncan v. Sylvester*, 24 Maine, 482.

necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened. Thus the individual who so manages the water he uses for his mills as to wash away the soil of his neighbor, is liable at once for all the injury occasioned by its removal, because it is, in its nature, a permanent injury; but if his works are so constructed that upon the recurrence of a similar freshet the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen, because it is yet contingent whether any such damage will ever arise. A person erects a dam upon his own land, which throws back the water upon his neighbor's land; he will be answerable for all damage which he has caused before the date of the writ, and ordinarily for no more, because it is as yet contingent and uncertain whether any further damage will be occasioned or not, because such a dam is not of its own nature and necessarily injurious to the lands above, since that depends more upon the manner in which the dam is used than upon its form. But if such a dam is in its nature of a permanent character, and from its nature must continue permanently to affect the value of the land flowed, then the entire injury is at once occasioned by the wrongful act, and may be at once recovered in damages. In one of the cases which arose from the building of the great canals of New York, the case was that a high dam was erected upon the falls of the Hudson for the purpose of diverting the waters of the river into a feeder for the canal; the lands of an owner above were buried twenty feet under water, and their value to him, of course, entirely destroyed; the work was in its nature and design permanent. There it would be clear that the party injured would be entitled to recover the entire damages he had sustained, and must sustain in a single action, in truth, substantially the entire value of his property." The court also cited *Woods v. Nashua Manuf. Co.*,¹ which was a case of taking lands for a canal.² It will

¹ *Woods v. Nashua Manuf. Co.*, 5 N. H. 467.

² See *Powers v. Council Bluffs*, 45 Iowa, 652. Here the city constructed a

be observed that the case itself was one for damages by building a railroad, and that the two cases cited in the opinion are cases for damages by building canals. They resemble the cases of eminent domain, of which we shall speak hereafter, but the reasoning is extended by the court to all permanent nuisances.

§ 417. In *Fowle v. New Haven & Northampton Co.*,¹ where the action was for the washing away of the plaintiff's land by the diversion of a stream caused by building a railroad embankment, Gray, J., said: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent

ditch so that it emptied into a main stream by a fall of several feet, instead of grading the bed of the ditch to the level of the stream. The action of the water washed out a cavity at the fall, which worked backward up the channel of the ditch, and at length washed out portions of the plaintiff's soil, for which injury he brought suit. The period of the statute of limitations had run after the stream began to wash out his premises, but there were recent damages within the period. It was held that the nuisance was a permanent one, the damages from which were calculable from the first; and that the entire action was barred. The court quoted and applied the rule in *Troy v. Cheshire R. R. Co.*, *supra*, and said: "In the light of it (this principle) we can see that, in a case of overflow from a mill-dam, the injured party should be allowed to maintain successive suits." "If the cause of the

injury is not permanent, if it depends upon human volition, as the maintenance of a mill-dam, the damages cannot be foreseen and estimated." So where a railroad company erected an embankment for its track, which closed the natural channel of a stream, and diverted water from land, it was held that the injury was a permanent one, for which damages might be at once fully recovered. *Stodghill v. C. B. & Q. R. R. Co.*, 53 Iowa, 341. Where a town is required by law to repair and maintain a road washed out by the overflow of a mill-pond, it may recover the cost of repairs and of building a wall protecting it against future injuries. *Andover v. Sutton*, 12 Met. 182. See, also, *Baldwin v. Oskaloosa Gas Light Co.*, 57 Iowa, 51, and *Dickson v. Chicago, R. I. & P. R. R. Co.*, 71 Mo. 575, where the doctrine is considered by the court.

¹ 107 Mass. 352; 112 Mass. 334.

injuries from the same cause." In the later report of the case, after further proceedings, Colt, J., said: "The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

§ 418. In the case of *Chicago & Alton Railroad Co. v. Maher*,¹ the action was for damages caused by a railroad drawbridge which spanned the river upon which the lot fronted, immediately at the corner of the lot, and by its supports obstructed the access of vessels to the plaintiff's dock. The bridge in question was erected while the property was owned by the plaintiff's husband, and he conveyed it to her without bringing suit for the obstruction. She then brought the action for the injuries caused. The court held that the structure was permanent, and the damages entire, and that the total right of action therefor had vested in the grantor, and could not be transferred.²

§ 419. To this class must be referred the cases of nuisance for which the measure of damages is the depreciation in the

¹ 91 Ill. 312, relying on *C. & P. R. Co. v. Stein*, 75 Ill. 41, which was a case of eminent domain, with facts like those in the *Maher* case; and on *Ottawa Gas Light & Coke Co. v. Graham*, 28 Ill. 73. This was a case where a well was polluted by percolations from the defendant's gas works. The court held that the measure of damages was the depreciation in the value of the property caused thereby. In *Decatur Gas Light Co. v. Howell*,

92 Ill. 19, the action was for the continuance of a nuisance by the maintenance of gas works, polluting the water supply of the plaintiff. The plaintiff had formerly recovered for the depreciation in value of his premises from the same cause, and that recovery was held a bar to any further action for the same cause.

² For a similar ruling, see *Ortwine v. Baltimore*, 16 Md. 387.

value of the property injured.¹ Such damages are for the permanent injury to the property, although the injury to the use of it is distinguished by some cases as an additional item not included;² and having been recovered once, no further action lies for that cause.³ In *Seely v. Alden*⁴ the action was for the pollution of a stream by throwing tan bark into it, and the plaintiff contended that he should be allowed the depreciation in the value of his premises, which was allowed by the court. Agnew, J., said: "If, therefore, a permanent injury was created by the lodgement of the tan bark in the pool of their dam, which actually depreciated the property in value as a water-power, it must affect the price or value of the land to which it belonged, and why should this not be compensated in damages? It is difficult to give a good reason against it. The plaintiffs in that case have lost just so much in the value of their property by the illegal act of the defendant. Compensation for the diminished enjoyment or use of the property for a certain number of years is no compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself." "The argument of the defendant in error is that the injury is only temporary, the tan bark being light and removable by freshets. But this assumes the fact. The plaintiffs declared upon the deposit as an injury to their freehold, alleged it to be permanent in its character, and offered evidence to this effect. The fact was one to be decided by a jury; but in assuming that the injury was only to the use of the property for a certain period of time, the court withdrew the fact of permanency. If the deposit was of a temporary character, it was the subject of proof, and the defendant's right to an instruction to the jury to con-

¹ *Chase v. New York Central Railroad Co.*, 24 Barb. 273; *Easterbrook v. Erie Railway Co.*, 51 Barb. 94; *Hanover Water Co. v. Ashland Iron Co.*, 84 Penn. St. 279; *Seely v. Alden*, 61 Penn. St. 302; *Minnequa Spring Co. v. Coon* (Penn.), 12 Reporter, 763; *Marsh v. Trullinger*, 6 Oregon, 356;

Finley v. Hershey, 41 Iowa, 389. And see *Anon.*, 4 Dall. 147.

² *Illinois Central Railroad Co. v. Grabill*, 50 Ill. 241, 246.

³ *Chicago & Alton Railroad Co. v. Maher*, 91 Ill. 312.

⁴ *Seely v. Alden*, 61 Penn. St. 302, 306.

fine the damages to the use during its temporary existence, depended on the finding of the fact.”¹

§ 420. The law will not presume a permanent injury. In order to recover such damages the plaintiff must aver and prove that the act complained of necessarily causes a permanent injury to the value of his property.² In *Battishill v. Reed*,³ which was for the nuisance of overhanging eaves, Creswell, J., said: “The plaintiff had no right to assume that things would remain as they were.” In *Bare v. Hoffman*,⁴ which was an action for diminishing the volume of a stream, the court above said: “The whole damage of which the defendant in error complained was caused by Bare’s placing a pipe in the stream on his own land. A severance of the pipe would cause the water to run in the accustomed channel, and remove the whole cause of complaint. It is not the case of an entry on the land of the defendant in error, and a severance of any part of his freehold, nor of depositing a permanent nuisance thereon.” “The act he committed was not of such a permanent character as to assume it to continue through all coming time, and to justify the assessment of damages accordingly. The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff’s right. Subsequent actions are to recover damages for a continuance of the obstruction.”

§ 421. *Second.* In single trespasses the act complained of is a direct injury in itself, and the damages are merely consequential. Fresh damages from the trespass do not give a fresh cause of action, and the plaintiff must recover the entire

¹ In *Hatch v. Dwight*, 17 Mass. 289, where a mortgagee was given as damages the interest on the value of a mill-site from the time the action accrued.

² 1 Sutherland on Damages, 199; Sedgwick, Leading Cases on Damages, 662 (note); *Battishill v. Reed*, 18 C. B. 658; *Whitehouse v. Fellowes*,

10 C. B. n. s. 765 (see *ante*, § 412); *Bare v. Hoffman*, 79 Penn. St. 71; *Burnett v. Nicholson*, 86 N. C. 99; *Clark v. Nevada Land & Mining Co.*, 6 Nev. 203. And see *Hoagland v. Veghte*, 30 N. J. L. 516, and *Corning v. Troy Iron Factory*, 29 Barb. 311.

³ *Battishill v. Reed*, 18 C. B. 658.

⁴ *Bare v. Hoffman*, 79 Penn. St. 71.

damages from the trespass in a single action.¹ In *Oakley v. Kensington Canal Co.*,² a canal company entered upon the plaintiff's land, and dug it away for the purpose of sloping the banks of their canal, in consequence of which the land was overflowed at every high tide. It was held by Lord Denman, C. J., that the injury was complete when the trespass was committed, and that no new cause of action arose with every overflow. In *Clegg v. Dearden*,³ the defendant trespassed upon the plaintiff's land by making an excavation into his mine, through which water flowed into the mine. Lord Denman held that the cause of action was complete when the excavation was made, and that his failure to fill up the excavation was not a new cause of action. "The defendant, having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor of a nuisance, nor is it the breach of any legal duty."⁴

¹ *Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138; *Clegg v. Dearden*, 12 Q. B. 575; *Kansas Pacific Railway Co. v. Muhlman*, 17 Kansas, 224; *Vedder v. Vedder*, 1 Denio, 257; *White v. Mosely*, 8 Pick. 657; *Dickinson v. Boyle*, 17 Pick. 78. To same effect see *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. A former judgment in trespass for the same cause, as for flowage constituting a trespass, between the same parties, is conclusive in the absence of new circumstances. *Dick v. Webster*, 6 Wis. 481.

² 5 B. & Ad. 138.

³ 12 Q. B. 575.

⁴ See, also, *Kansas Railway Co. v. Muhlman*, 17 Kansas, 224. In this case the defendant entered upon the plaintiff's land and dug a ditch thereon, diverting waters from their natural channel, and causing them to overflow the plaintiff's land. It was held the trespass itself constituted the invasion of the plaintiff's rights, and that the cause of action was complete. *Brewer*,

J., said: "So far as the company had acted, its action was finished when it had dug the ditches. It had invaded Muhlman's rights; it had committed a trespass on his lands. It was then responsible in an action for the injury it had done by that trespass. Such action might have been brought immediately, and in such action could have been recovered all damages done to Muhlman by the trespass, and which might have included the cost of restoring the ground to the condition it was before the digging of the ditches." Where the original act itself is not an invasion of the plaintiff's rights, then there is no cause of action until such act has caused damage, and the right of action dates from that time. On the other hand, where the original act is unlawful and an invasion of the plaintiff's rights, the cause of action dates from that act, and a new cause of action does not arise from new damage resulting therefrom. *Ibid.*

§ 422. In *DeCosta v. Massachusetts Mining Co.*,¹ the defendant had dug a ditch on the plaintiff's land. It was held that the plaintiff could not recover as damages a sum sufficient to fill up the ditch, or any prospective damages. Cope, J., said: "The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never be incurred. It is possible that the cost of filling up the ditch may far exceed any injury resulting from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose." *Vedder v. Vedder*² illustrates the distinction between the consequences of a single trespass and a continuing nuisance. The defendant trespassed on the plaintiff's land and polluted his stream by placing foul matter therein. The plaintiff afterwards gave him, for a valuable consideration, a discharge and satisfaction "of all demands to date." It was held that such discharge extinguished all right of action, not only for the original injury and the damages up to that time, but for all future damages occasioned by the nuisance. The court say: "If the nuisance had been placed on the defendant's land, at the head of the stream, so as thereby to have proved equally injurious to the plaintiff, an accord and satisfaction, or a release of all demands to the 1st of June, would not have barred an action for the continuance of the nuisance after that day. Every succeeding injury after that time would have been a new and distinct cause of action. But that is plainly distinguishable from this case."

§ 423. *Third.* In the case of continuing trespasses, the rule is altered to conform to that for continuing nuisances.

¹ 17 Cal. 613.

² 1 Denio, 257. In *Law v. McDonald*, 62 How. Pr. 340, this rule was applied to the wrongful interruption of an easement. The plaintiff had an easement to obtain the water supply for his house by a pipe laid from a spring on the defendant's land, and the defendant had wrongfully cut the pipe, and prevented the plaintiff from re-laying it; for which the plaintiff had

recovered in former suits. The plaintiff afterwards brought another suit for the further damage arising from the continued lack of water supply. It was held that the cause of action was complete at the former suit. There was no prevention of the plaintiff from re-laying the pipe after the former recovery, but only the continued damage.

In such cases, only the damages which have happened before action brought are recoverable, and successive actions may be brought to recover any damages happening thereafter. "The continuing of a trespass from day to day," says Sergeant Williams,¹ "is considered in law a several trespass on each day, and must be directly and positively answered by the defendant, as well as the original trespass."² The leading case is that of *Holmes v. Wilson*.³ There the defendants, as trustees of a turnpike road, had built buttresses on the land of the plaintiff to support the road. The plaintiff had recovered damages for the erection of the buttresses in a former suit, and now brought an action of trespass against the defendants for wrongfully continuing them on his land, and it was held the action would lie. Lord Denman, C. J., said: "The former and the present actions are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass."

§ 424. In *Battishill v. Reed*,⁴ the nuisance consisted of overhanging eaves and gutters. Evidence of the diminution in the value of the property was rejected. The court above sustained the ruling, and held that the defendant was liable

¹ 1 Wms. Saund. 20, note 1, to *Manchester v. Vale*.

² Citing *Monkton v. Pashley*, 2 Ld. Raym. 976.

³ *Holmes v. Wilson*, 10 A. & E. 503. See *Bowyer v. Cook*, 4 C. B. 236. An earlier case, not referred to in *Holmes v. Wilson*, is the case of *Farmers of Hampstead Water*, 12 Mod. 519. There, says the report, "upon executing a writ of enquiry of damages in trespass, for digging a hole in the plaintiff's soil, whereby his land was overflowed, *continuando transgressionem*, for nine months, and it was insisted that they might give evidence of a consequential damage, after the nine months, as well as in a nuisance which continues for nine months, and the cause is removed, if the effect

continues afterwards," damage may be recovered for it; but Holt, C. J., said "he was not satisfied that the parity would hold, for the gist of the action in a nuisance is the damage; and therefore, as long as there are damages there is ground for an action; but trespass is one entire act, and the very tort is the gist of the action; and therefore, he said, he doubted whether an action would lie for the continuance of a trespass, as for that of a nuisance." Lord Holt's reasoning would require the entire damages to be recovered in one action.

⁴ *Battishill v. Reed*, 18 C. B. 696. The overhanging of an eave is a trespass, and the result is the same as in *Holmes v. Wilson*.

to a new action for every day of its continuance. The rule is stated in the same way in Maine. Continuing trespasses and continuing nuisances are placed in the same class as cases for successive actions, the damages in each being computed only until action brought. In *Cumberland Canal Co. v. Hitchings*,¹ the defendant, acting for the city of Portland, had filled up the bed of the canal with a solid embankment for a street. The court said: "When something has been unlawfully placed upon the land of another which can and ought to be removed, then, inasmuch as successive actions

¹ *Cumberland Canal Co. v. Hitchings*, 65 Maine, 140. And see *Russell v. Brown*, 63 Maine, 203. The same proposition is stated as to continuing trespasses in *Savannah Canal Co. v. Bourquin*, 51 Ga. 378; but the case is one of overflowing plaintiff's lands by reason of the defendant's negligence. For successive single trespasses to the plaintiff's close and dam, successive actions lie. *White v. Moseley*, 8 Pick. 657. Mr. Mayne (*Mayne on Damages*, 89), after reviewing some of these cases, says: "In fact the whole law upon the subject of damages in the case of continuing nuisances or trespasses seems in a very unsatisfactory state." For continuing trespasses, such as building a house on another's land, he says: "The fair rule in such a case would be to give the plaintiff such damages as would compensate him for the loss sustained up to the time of the verdict, and would pay him for putting the land into its original state. If he chose to leave the trespass after this, it would clearly be because he thought it advantageous to himself; and if so, he ought not to be allowed to sue again." And he cites a case where such damages were allowed in an action on a covenant to repair. *Shortridge v. Lamplugh*, 2 Ld. Raym. 798-803. The reporter of *Holmes v. Wilson* (10 A. & E. 503) indicated this rule in a note at the end of the case. He says: "Quære whether the plain-

tiff, in the principal case, might not have recovered damages in respect of the expense of removing the buttresses herself; and the effect of such recovery." The point is directly considered in *Kansas Pacific Railway Co. v. Muhlman*, before referred to (17 Kansas, 232). Speaking of *Holmes v. Wilson*, the court said: "It seems to us very doubtful whether this ruling can be sustained upon principle. As suggested by the reporter, suppose the plaintiff had recovered, as a part of his damages in the first action, as he properly might, the expense of removing these buttresses, and this fact had appeared in the second suit, could the action have been maintained? And what difference, we ask, does it make whether he did actually recover for such expense? It was a proper matter of damages; it was a part of the amount necessary to place the land as it was before the trespass; he was entitled to recover it, if he proved it; and if he failed to prove it, or if after proving it the court refused to allow it, neither the failure nor the error laid the foundation for a second action." The rule of allowing the cost of restoring the premises was rejected in *Easterbrook v. Erie Railway Co.*, 51 Barb. 94, and *De Costa v. Massachusetts Mining Co.*, 17 Cal. 613, on the ground that such cost might exceed the value of the soil itself, or the injury suffered.

may be maintained, until the wrong-doer is compelled to remove it, the damages in each suit must be limited to the past and cannot embrace the future." They distinguish it from the cases of permanent injuries on the ground that the canal should have been bridged and not filled up.

§ 425. The subjects of venue and territorial jurisdiction are so intimately related that we shall take them up together, considering, first, the venue of private actions and of indictments; secondly, the jurisdiction, as between the States, of suits at law and in equity for injuries affecting waters; and, thirdly, the jurisdiction over such injuries exercised by the federal courts.

§ 426. Actions for nuisances and trespasses are local, and in them the venue must be laid and the trial held in the county where the injury was committed, or where the cause of action arose. For such injuries to or by means of waters as constitute trespasses, the action of trespass *quare clausum* must be brought in the county where the injured land lies.¹ The rule is the same for nuisances, except where the act causing the injury is done in another county, to which case we shall presently refer.² In these actions it is held sufficient to lay the venue in the body of the county, and if the place be more particularly alleged, the allegation is surplusage, and variance of proof therefrom is immaterial.³ Where an

¹ *Shelling v. Farmer*, 1 Strange, 646; *Berwick v. Ewart*, 2 Wm. Bl. 1070; *Doulson v. Matthews*, 4 T. R. 503, limiting *Mostyn v. Fabrigas*, Cowper, 161; s. c. 1 Smith's Ldg. Cas.; *Livingston v. Jefferson*, 1 Brock. 203; *Roach v. Damron*, 2 Humph. 425; *Champion v. Doughty*, 3 Har. (N. J.) 3; *Ham v. Rogers*, 6 Blackf. 559; *Chapman v. Morgan*, 2 G. Greene, 374.

² That the action for nuisance is local, see *Warren v. Webb*, 1 Taunt. 379; *Mersey & Irwell Navigation Co. v. Douglas*, 2 East, 497; 1 Chitty Pl. 281; *Cooley on Torts*, 471. Where

part of the injured property lies in one county and part in another, provision is sometimes made by statute, allowing the action to be brought in either county. Thus in Pennsylvania, under St. 1836, June 13, §§ 79, 80, on actions real, where an action was brought for injuring a mill and dam, the mill and part of the dam being in one county, and the remainder of the dam being in another county, it was held that the whole was a "single tenement," and that suit could be brought in either county. *Finney v. Somerville*, 80 Penn. St. 59.

³ *Mersey Navigation Co. v. Douglas*,

action on the case was brought for obstructing navigation in the Irwell River by a weir or dam at Preston, in the county of Lancaster, non-suit was moved for default of proving that the Irwell was at Preston; but it was held not necessary to give a local description to the nuisance, or to prove it to have happened at such a place, but it is sufficient if it be at any other place within the county.¹ In an early case for overflowing the plaintiff's land by a mill-pond, it was objected that "there was no place mentioned where *stagnum molendini* should be, and there the nuisance is done; and it may be in another vill. *Sed non allocatur*, for it shall be intended to be in the same vill where the mill is."² If, therefore, the venue was sufficiently laid in describing the mill, it was unnecessary to allege the location of the pond itself which covered the plaintiff's land.

§ 427. The nuisance must be proved to have been committed within the county where the venue is laid. An action on the case was brought for failure to repair a spout on the defendant's property in Middlesex, whereby the rain penetrated and injured the plaintiff's wall adjoining the defendant's premises. The lands were proved to be in Surrey. It was held that the action was local, and the variance fatal; and that if no place is alleged where the nuisance was committed, the county in the margin would be intended.³ Where the defendant obstructed the waters of a navigable river by erecting a dam in Westmoreland County, whereby the plaintiff's boat was lost, the court held that he must sue in Westmoreland, and could not maintain the action in Fayette.⁴ So where the parties owned adjoining mines in Columbia County, and one mine was flooded by the wrongful management of the other, for which the plaintiff brought

¹ 2 East, 497; *Simmons v. Lillystone*, 8 Exch. 431.

² *Mersey Navigation Co. v. Douglas*, 2 East, 497.

³ *Brent v. Haddon*, Cro. Jac. 555.

⁴ *Warren v. Webb*, 1 Taunt. 379. In *Simmons v. Lillystone*, 8 Exch.

431, Parke, B., says that this case is difficult to understand. For a similar decision in an action for obstructing a footway, see *Richardson v. Locklin*, 6 B. & S. 777.

⁵ *Oliphant v. Smith*, 3 Pen. & W. (Pa.) 180.

suit in Philadelphia County, describing the mines as situated in the county of Columbia, *to wit*, at the county of *Philadelphia*, it was held that the action was local, and that the venue could not be transferred by such a fictitious averment.¹

§ 428. Where the nuisance is committed in one county, and the property injured lies in another, the action may be maintained in either county. The first form of remedy for such cases was the assize *in confinio comitatus*, by which a writ issued to the sheriff of each county to summon twelve men from the neighborhood, and a patent issued to the justices to try the assize between the counties.² In the Abbe de Stratforde's case³ it was adjudged that for a failure to repair a wall in Essex, which he ought to repair, whereby my land is drowned, I may bring my action in Essex, for there is the default; and Lord Coke, citing the decision in Bulwer's case,⁴ adds, "or I may bring it in Middlesex, for there I have the damage, as it is proved by 11 R. 2, Action sur le Case, 36."⁵ In Bulwer's case the rule is laid down

¹ Prevost v. Gorrell, 2 Weekly Notes of Cas. (Penn. Sup. Ct.) 440; s. c. affirmed, 3 W. N. C. 366.

² F. N. B. 183 K.; Co. Lit. 154 a; Leveridge v. Hoskins, 11 Mod. 257.

³ Y. B. 7 Hen. 4, 8, pl. 10; and see this case as cited in Archeboll and Borrell's case, 3 Leon. 141.

⁴ Bulwer's case, 7 Co. 1 a.

⁵ The case of 11 R. 2 is stated in Bellewe's Les Ans du Roy Richard le Second, p. 4. See reprint by Stevens & Haynes, 1869. The case related to the duty of fencing. It is translated as follows, by counsel for the defendant (for whom the court ruled), in Worster v. Winnipiseogee Lake Co., 25 N. H. 525, 528: "Action on the case against another, brought in the county of Kent, and declared by Rykel, that all those who hold such land ought to repair and enclose a certain close in a certain vill, and alleged that the defendant was the tenant of the same land thus charged, and that the

close was open and not repaired, by reason of which the cattle of the tenants entered on his land, etc.; and the writ covered all the whole matter, and note that the land, which was thus charged with the making and repairing the enclosure, was in the county of Surrey, and the close in another county" (*i.e.* in Kent). Kirby: "In such case the writ of *de curia claudenda* ought to have been brought, and not a writ of trespass. Judgment prayed of the writ. Rykel (answered), etc. . . And it was held by all the court that this was a good issue on the case, for nothing is recovered but damages. In this case the *gravamen* of the declaration was the injury done to the plaintiff's land, and the action was properly brought in the county of Kent, that the jury of the county might *videre tenementum illud*." In 21 Vin. Abr. 86, pl. 6, the case is stated somewhat differently. The locations of the two pieces of land are changed, and

generally: "In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will;" and this rule prevails in most jurisdictions to-day. Where the defendant in Dorset dug ditches, and diverted water from streams watering the plaintiff's farm in Devon, it was held that the action would lie in either county.¹ In *Sutton v. Clarke*, it was held that if a trench cut in Northampton causes the plaintiff's lands to be overflowed in Warwick, the action may be brought and tried in Warwick.²

§ 429. The first American case in point was one of injury to a mill by a dam. The action was brought in Plymouth County, where the mill was, and the dam was alleged under a *videlicet* to be in the same county. The evidence proved the dam to be in Bristol. Parker, C. J., held that the variance was immaterial, and that the place where the injury was done, to wit, at the mills, gave locality to the action, and not the source from which the mischief came.³ But in the following year the same court, in a case for injuries, caused apparently by the same dam, held that where an injury to a fishery in Plymouth County was caused by the dam in Bristol County, Bulwer's case was decisive, and the owner of the fishery could bring his action in either county.⁴ In the late case of *Pilgrim v. Mellor*,⁵ the defendant had erected a dam in Stark County, which produced an injury to the adjoining land of the plaintiff, lying in Bureau County. The action was

the action is said to have been brought in Surrey, "where the land was. And the writ awarded good, because nothing is to be recovered but damages." The land to be fenced, and the plaintiff's land which was injured, both lay in one county, and the land charged with the duty of fencing lay in another.

¹ *Leveridge v. Hoskins*, 11 Mod. 257. See *Wells v. Ody*, 1 M. & W. 452.

² *Sutton v. Clarke*, 6 Taunt. 29.

³ *Thompson v. Crocker*, 9 Pick. 59.

⁴ *Borden v. Crocker*, 10 Pick. 383. To the same effect see *Oliphant v. Smith*, 3 Pen. & W. 180.

⁵ 1 Brad. (Ill. App.) 448; s. c. 17 Am. L. Reg. (N. S.) 729. To same effect see *Lower King's River Water Co. v. King's River & Fresno Canal Co.*, 9 Pacific Coast L. J., 334 (Sup. Ct. Cal.); *Powers v. Ames*, 9 Minn. 178 (*semble*).

brought in the county where the dam was erected, and it was held in the appellate court that the action might be brought in either county.

§ 430. Opposed to these decisions is that in *Worster v. Winnipiseogee Lake Co.*,¹ which came up on facts precisely similar to those in the case last mentioned. The court held that the action should have been brought in the county where the plaintiff's land lay. Gilchrist, C. J., reviewed the authorities at length, and held that the rule in Bulwer's case sprang from the ancient remedy of assize *in confinio comitatus*, which having become obsolete, the rule must go with it. He says: "The decisions, and they are but few, which hold that an action will lie in the county where the nuisance was done, or in that where the injury was sustained, depend upon Bulwer's case, 7 Co. 1, and that seems to be founded upon reasons which have long since ceased. It does not appear to us that there is any reason for excepting such cases as the present out of the operation of the general rule, and it is very clear that the exception rejects the principle of the rule, and is not a mere modification of the application of it. The erection of the dam, of itself, gave the plaintiff no cause of action. It was not until his land was injured that an action accrued, and this happened in the county of Carroll (where the land lay). The general rule then applies, and it is there that the action should have been brought."²

¹ *Worster v. Winnipiseogee Lake Co.*, 25 N. H. 525. For a reference to this case *per* Ryan, C. J., *arguendo*, and apparent agreement with it, see *in re Eldred*, 46 Wis. 530. See, also, *Wisconsin Rev. Stats.* (1878), § 2619.

² He denied the doctrine in the *Abbot of Stratford*'s case, saying there was no reason for it, and relied principally on *Simmons v. Lillystone*, 8 Exch. 431; 22 L. J. Exch. 217; 20 E. L. & E. 445. In that case the plaintiff owned premises in the county of Kent, abutting on the Thames at a certain point of the river called the

Blockhouse Dock, and the defendant obstructed the dock by placing piles, etc., thereon. The venue in the margin of the declaration was London. Parke, B., said: "Probably the objection might have been raised by special demurrer; but, after verdict, it certainly comes too late, because, then, any defect in the venue is cured by St. 16 & 17 Car. 2, c. 8. It is enough, for the present purpose to say that there is nothing which makes it necessary to prove, on the part of the plaintiff, that the obstruction took place in the city of London." "It is unnecessary to decide

§ 431. The distinction between local and transitory actions has been modified or abrogated in many of the new systems of procedure; but in most of the States it retains its place as part of the law. In Ohio it has been abolished by judicial legislation;¹ and in England it has been abolished by the Judicature Acts, and the question of venue must there be considered as new.²

whether this is a local action, though I am rather disposed to think it is, since it is an injury to the plaintiff's premises." It will be seen that the nuisance, and the land injured thereby, both lay in the same county, and that the objection was that the plaintiff had brought his suit outside of that county. There is nothing here contrary to the exception in *Bulwer's* case. Baron Parke's consenting that it was a local action is not contrary, because the gist of the exception is that where two counties are involved, the action has *two localities*, in either of which it will lie, not that it is transitory. The New Hampshire case makes no reference to *Leveridge v. Hoskins*, 11 Mod. 257. In that case (decided in 1710), Holt, C. J., said: "Here is a cause of action that arises in both counties, and the action may be brought in either." It followed the analogy of the assize *in confinio comitatus*, but that remedy had already gone into disuse. The court did not think that the need had disappeared with the old writ. In truth, that assize disappeared only in common with all the writs of right, and the special necessity in this case for a remedy, in either county, remained the same as ever. Courts generally have held that the rule of the common law was arbitrary and rested on historical grounds (see *Doulson v. Matthews*, 4 D. & E. 503, *per* Buller, J.), and the distinction is fast disappearing from the new systems of procedure. *Genin v. Greer*, 10 Ohio, 209; and see 22 Alb. L. J. 47. But the New Hampshire court held that a branch

of the common-law rule allowing greater liberality in the venues within which an action can be brought, historically founded on a writ of right, and in its present form dating back to 1406 (*Abbe de Stratford's* case), and perhaps of equal date with the rule itself, was an unreasonable invasion of the common law, and that the general rule must be restored and applied with uniform rigor.

¹ *Genin v. Greer*, 10 Ohio, 209; N. Y. Code, 1880, §§ 982, 984. It was early determined in Massachusetts that, by their statutes, an action for injuries to realty where the damage did not exceed twenty dollars might be brought before a justice of the peace for the county where the wrong-doer lived, although the land lay in another county. *Sumner v. Finegan*, 15 Mass. 280. Under Mass. Gen. Sts. c. 149, it was held that a complaint for flowing land by a dam might include tracts lying in different counties, but overflowed by means of the same dam, and would lie in a county where any portion of the land lies. *Bates v. Ray*, 102 Mass. 458, and see *Todd v. Austin*, 33 Conn. 87. In New Jersey it was held that in such actions the venue cannot be *changed* from the county where the land lies, under their statute. *Deacon v. Shreve*, 2 Zab. 204. In a similar case, under the Missouri statute (Wag. St. § 4), it was held that the venue could be changed, and accordingly we find the venue changed three times in that case. *Taylor v. Atlantic Railroad Co.*, 68 Mo. 397.

² 38 & 39 Vict. c. 77, Ord. XXXVI. R. 1 (L. R. 10 Gen. St. 813). In Eng-

§ 432. In the case of indictments for nuisances committed in one county and injuring the public in another, the rule of the common law was the same, and the offender was liable to indictment in either county.¹ But the weight of more recent decisions is opposed to this rule, and limits the venue for an indictment to the county where the act is committed. The remedy by indictment has by legislation in some States become a proceeding *in rem*, which accounts for the change.

§ 433. The question was considered by the Supreme Court of Wisconsin in Eldred's case.² That was the case of an indictment of an unauthorized dam, situated in one county, and producing injurious effects in another. Ryan, C. J., in delivering the opinion said: "The venue of local actions rests entirely, in the absence of statute, upon the authority of adjudged cases. But the venue of indictments rests upon fundamental law, as old as Magna Charta, entering into the provision of the constitution of the State." He then reviews the authorities and concludes: "If a dam, being a public nuisance, were on the confines of two counties, it might probably be indicted in either under § 7, c. 172 of 1858; perhaps if it were within a hundred rods of the county line. Possibly it would be competent for the legislature to provide that a dam situate in one county, but creating injurious effects in several, might be indicted in either. That question is not determined here, because there is no such statute. But in the absence of such legislation, a dam more than a hundred rods from a county line can be indicted in its own county only." He held that the indictment alleging a public nuisance in one county was complete, and that the

land, before the passage of these statutes, the venue of local actions might be changed after issue was joined, but not before, by order of the court or judge. *Bell v. Harrison*, 2 C. M. & R. 733; and see 3 & 4 Wm. 4, c. 42, § 22.

¹ Staundford, *Pleas del Corone*, lib. 2, p. 91; citing *Ass. Edw. 3*; *Ann. 19*, pl. 6; *Hawkins, Pleas of the Crown*,

Bk. 2, c. 25, § 37; 1 Chitty Criminal Law, 193 (2 Eng. and 4 Am. ed.). And see 2 Hale's *Pleas of the Crown*, 164. But Chitty cites no cases since the earlier writers which support the rule. He refers to *Scott v. Brest*, 2 T. R. 241, and 2 B. & P. 381, which were private actions for usury.

² *In re Eldred*, 46 Wis. 530.

per quod containing the averment of injury in another county was surplusage. "The radical difficulty in the argument" (for the other view) "is that an indictment is directed against the thing, as an offence against the public, while the private action at the common law goes upon the consequences of the thing only, for the recovery of damages for private injury. The maintenance of the nuisance is local in the county where it exists, though its effects may extend beyond the county."

§ 434. In Pennsylvania, where works were erected on a stream in Center County, which corrupted its waters in an adjoining county, it was held that the indictment could be prosecuted in Center County.¹ In Maine, where a dam lying partly in the town of Eddington, and partly in Bangor, both in Penobscot County, was alleged to be a nuisance, the indictment charging that the offence was committed in Bangor, it was held that the place was laid as venue and not as a description of the offence, and that the variance was immaterial.²

§ 435. In general, the rule holds good of indictments for nuisances that the venue need only be laid in the body of the county, but matters of description of the offence must be strictly proved as laid. So an indictment for obstructing a navigable stream must state the name of the stream, the place where the obstruction is situated, that the part obstructed is navigable, and that the passage of boats is obstructed at that point.³ Where the indictment is a pro-

¹ Commonwealth v. Lyons, 1 Clark (Penn. L. J.) 497.

² State v. Godfrey, 12 Maine, 361. The venue of an indictment for any offence committed in, or upon, a body of water, is laid in the adjoining county. Where an indictment charged that the offences (of assault and rescue) were committed "on the said Penobscot River, between the two towns of Enfield and Howland aforesaid, or within the limits aforesaid or

either of them, and within said county of Penobscot," it was held that the place was sufficiently alleged. State v. Roberts, 26 Maine, 263. So where an indictment (for murder) charged that the act was committed "at an island called 'Smutty Nose,' a place within the County of York," it was held sufficient. State v. Wagner, 61 Maine, 178.

³ Cox v. State, 3 Blackf. 193.

ceeding to abate, great accuracy of description and proof is required. An indictment of a mill-dam, creating a public nuisance by flowage, described the nuisance as "a certain mill-dam in, about, and across a certain stream of water in said county, called Elkhart River," and this was held insufficient even after judgment for the State. "The land on which the dam is constructed," said the Court, "could have been described, or such a reference to known objects near or adjacent to it might have been made, as would have rendered the indictment in point of description sufficiently certain."¹

§ 436. Where different states or sovereignties are involved in actions of this kind, the question is different.² Actions will not be entertained for nuisances committed outside the State, and affecting lands in another State. Where the plaintiff owned a mill in New Jersey, from which the defendant diverted water by cutting a trench in New Jersey, and the plaintiff brought suit in New York, averring that the wrongful acts were done in New Jersey, to wit, at the city and county of New York, it was held that the action would not lie in New York.³ Where the nuisance is located in one State and the property injured is in another, the rule of the common law applies strictly that the action must be brought in the jurisdiction where the land which is injured is situated. And this is not inconsistent with the exception in *Bulwer's case*. By the common law, where the offence was complete in the sovereign's dominions, he gave a remedy in either of two counties, for injuries caused in one county and accomplished in another. By the common law the sovereign gave his subjects redress for any injuries to lands in his dominion, though caused by acts outside, if jurisdiction over

¹ *Wood v. State*, 5 Ind. 433. Where, in an indictment for maintaining a nuisance (in this case a soap factory), the nuisance was alleged to be maintained on a particular tract of ground, the State was held bound to prove the location as laid, or fail in the prosecution. *Wertz v. State*, 42

Ind. 161. Confer *Roscoe's Crim. Ev.* 85.

² As trespass will not lie for injuries to lands in another county, *a fortiori* it will not lie for injuries to lands in another State.

³ *Watts v. Kinney*, 23 Wend. 484; affirmed, 6 Hill, 82.

the offender could be obtained. But the sovereign acting through the common law never attempted to redress injuries to foreign real estate, springing from causes set in motion within his dominion, the reason being that the act is wrongful only by reason of consequences happening beyond his territory and jurisdiction.¹

§ 437. The first American case in which the question was involved was that of *Thayer v. Brooks*.² There the action was brought in Ohio for injuries to a mill and water-power in Ohio, by the diversion in Pennsylvania of water which was accustomed to flow to the mill. The supreme court of Ohio held that the action would lie. In their opinion the court say: "The act was done in Pennsylvania, the injury which was occasioned by that act was sustained in Ohio. In such a case it is believed the suit would well lie in either State. When an injury has been caused by an act done in one county, to land, etc., situated in another, the venue may be laid in either." The point agrees with the law in general, but the dictum that the action would lie in either State is unsound in principle, and contrary to the weight of the authorities.

§ 438. In 1855 a similar question came up in Maine. It was held that an action on the case would lie in Maine for flowing lands in that State by a dam across a river forming the boundary line between Maine and New Hampshire, to feed a mill situated in the latter State.³ The next case came

¹ *Doulson v. Matthews*, 4 T. R. 503; *Livingston v. Jefferson*, 1 Brock. 203; *Mostyn v. Fabrigas*, Cowper, 161.

² 17 Ohio, 489; citing 1 Chitty Plead. 299. The court treated the action as a local one to be determined by the rules of the common law. In so doing, they overlooked their earlier decision in *Genin v. Greer*, 10 Ohio, 209, abolishing the distinction between local and transitory actions. If the court had said: "From the rule of this court making all

actions transitory, it would follow that the action could be brought in either State," the dictum would have been sound. The short point involved, that the State could give a remedy for injuries to land within its borders, though caused by acts done outside, where jurisdiction of the wrong-doer could be had, was correctly determined.

³ *Wooster v. Great Falls Manuf. Co.*, 39 N. H. 246.

up in Illinois. A dam which was erected in Will County, Illinois, for the purpose of feeding a canal, caused the flooding and injury of lands in Indiana. The owner of the land brought suit in Illinois. It was held that the action would not lie, and that only the courts of the State within whose limits the injured lands lay could take jurisdiction.¹

§ 439. A contrary decision was reached in a recent case in Texas. The parties were both citizens of Texas, and the plaintiff owned lands on the south bank of the Rio Grande, in Mexico. The defendant placed obstructions in the bed of the river, on the Texas side, which threw the current of the river against the plaintiff's land, and caused serious injuries. The court followed the *obiter dictum* in *Thayer v. Brooks*, held that the rule in *Bulwer's* case applied, and that the action could be maintained.²

§ 440. In a State which has abolished or does not recognize the distinction between local and transitory actions, an

¹ *Eachus v. Trustees of Illinois Canal*, 17 Ill. 534. See, also, *Slack v. Walcott*, 3 Mason, 508, 517. In *New York*, in the recent case of *Ruckman v. Green*, 9 Hun, 225, it was held that an action could be maintained in New York for an injury to lands situated in New York, caused by a nuisance (a noxious trade) established and carried on in New Jersey.

² *Armendiaz v. Stillman*, 54 Texas, 623. The court also relied on the federal case of *Rundle v. Delaware Canal*, 1 Wall. Jr. 275, which will be noticed hereafter. The Texas court said (p. 631): "In our opinion, however, these common-law rules, respecting local and transitory actions, have no more to do in determining with us where suit can be brought and maintained, than the like rules in respect to the form and names of actions; but this solely regulated by and dependent upon the proper construction of the constitution and statutes of the State. In

the first it is emphatically declared in the bill of rights as a fundamental principle of government, that 'all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.' Now a party may not have an action *in rem* for or concerning land in a foreign jurisdiction, because redress cannot be given or had by such proceeding in due course of law; but personal damages may be given and enforced by due process of law within the State." This view is singular, as the statute, cited in the argument, provides (Tex. Rev. St. 1879, Art. 1198, pl. 13): "Suits for the recovery of lands or damage thereto; suits to remove encumbrances upon the title to land; suits to quiet the title to land, and suits to prevent or stay waste on lands, must be brought in the county in which the land or a part thereof may lie."

action *in personam* will lie for injuries to foreign real estate. An action was held to lie in Louisiana for damages to land and buildings in Illinois caused by a steamer which, in plying upon the Mississippi River during a high flood, struck against and injured the buildings.¹ An exception, taken below on the ground that the action would be local by the law of Illinois, was overruled. The Supreme Court said: "The present action is under our laws, a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought."

§ 441. The same question recently came up in England in the Admiralty Division, and again in the Court of Appeal, but was determined by an agreement of the parties.² The owner of a pier in Spain brought an action in the English court against the owner of an English ship for an injury caused by the ship knocking down a pier attached to the Spanish soil. James, L. J., said: "It is a very novel action, and very grave difficulties indeed might have arisen as to the jurisdiction of this Court to entertain any action or proceedings whatever with respect to injury done to foreign soil. But the question of jurisdiction has probably been successfully got over by what has been done in this case, inasmuch as the ship in question, the owner of which is sued, and which by a figure of speech may be called the delinquent ship, having been arrested in Spain, was released upon an agreement between the parties that all remedies against the ship and against the owners should be tried in this country. Such an agreement would give jurisdiction by contract, not only jurisdiction by consent." "Possibly this would get rid of the question, and the Court of Admiralty would have jurisdiction to enforce against the ship an equi-

¹ Holmes v. Barclay, 4 La. Ann. 63. As it is the property injured, which, as between States, determines the character of the action, an injury to a steamer, caused by the wrongful obstruction of a stream by a bridge, is held ground for a transitory action. Where a steamer owned

in Missouri was injured by a bridge over the Mississippi, on the Illinois side, it was held that the action was transitory and could be maintained in Missouri. Mason v. Turner, 31 Mo. 508.

² The M. Moxham, L. R. 1 P. D. 43, 107.

table right arising from this contract, by virtue of which the ship was released from its liability under the jurisdiction in Spain." Mellish, L. J., was equally doubtful of the jurisdiction, apart from the contract.¹

¹ See comments on this case in Foote's *Private International Jurisprudence*, pp. 135, 390. Mr. Foote considers the question as it was at common law, and as one of general jurisprudence. On p. 137, he thus condenses Lord Mansfield's opinion in *Mostyn v. Fabrigas* (1 Sm. L. C., 658, 680), before cited: "Lord Mansfield pointed out that there is a formal and a substantial distinction as to the locality of the trials. The substantial distinction is where the effect of the judgment cannot be had if the action is laid in the wrong place. The formal distinction is that which arises from the mode of trial, and excludes certain actions by means of the rules of venue. And, by way of example, it was said that there might be a solid distinction of locality, if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages. It cannot be doubted that the rule as to venue was, in Lord Mansfield's mind, the only obstacle to the trial by an English court of an action for injury to foreign realty. Nor is it easy to maintain that there is any reason more valid to restrain the jurisdiction now that that obstacle is removed. The execution of the judgment in such an action, inasmuch as it can only be brought when proper service is effected on the defendant, and execution can only issue on his person or property within the jurisdiction, cannot interfere with the sovereign rights of a foreign power, as it would in an action for the title to or possession of land. An injury to land is in fact a personal injury to its owner, and is no more beyond the jurisdiction of an English court, on general principles, than other per-

sonal injuries are." On page 390 of the same work, he says: "That difficulties would arise there can be no doubt, as the abolition of the rules of venue have cut away the main ground upon which the earlier decisions on the point were founded; but it is submitted that the result of the change has been to make the reasoning of Lord Mansfield in *Mostyn v. Fabrigas* applicable to its full extent, and to remove all reasons that existed previously from excluding actions for damages in respect of injuries done to foreign immovables from English courts." To same effect see Westlake, *Private International Law*, ed. 1880, p. 210, note, on actions for trespass to foreign soil. See, also, *The Uhla*, cited in note, L. R. 2 Adm. & Eccl. 29, and *De Lovio v. Boit*, per Story, J., 2 Gallison, 398, 474, 475. The distinction is abolished by the New York code, and the question of venue opened anew. Actions for waste and nuisance must be brought in the county where the land lies, but no provision is made for actions for trespass. In the *Albany Law Journal*, vol. 22, pp. 47-50, a contributor contends forcibly that the effect of the code is to give the courts of that State jurisdiction of actions for injuries to land situated in a foreign State or county. The code provides (§ 982): "But where all the real property to which the action relates is situated without the State, the action must be tried as prescribed in § 984 of this act." § 984 reads: "An action not specified in the last two sections must be tried in the county in which one of the parties resided at the commencement thereof. If neither of the parties then resided in the State, it may be tried in any county

§ 442. In proceedings against the nuisance in abatement, and in all proceedings *in rem*, jurisdiction necessarily depends on the presence of the property or *res*, and its subjection to the control of the court; and therefore such actions are maintainable only in the State and county where the property is situated.¹ This applies to indictments *in rem*. Although indictments for nuisances affecting two counties may have been entertainable in either county by the common law, the same rule does not apply between States. An indictment for a nuisance can properly be brought only in the State within which the nuisance was committed. This is true of the common-law indictments of offenders, as well as of the statutory indictment *in rem*.²

§ 443. Indictments lie only for breaches of the law punishable as crimes, and criminal laws have no extra-territorial force.³ Acts done outside the sovereign's territory are not breaches of *his* law, although they may produce harmful consequences within it. Such consequences are not crimes in themselves. The first case involving the question arose in New Hampshire,⁴ and is opposed to this reasoning. There an indictment was found against the defendant for erecting and maintaining a dam, thereby overflowing the highway and making it impassable. The indictment alleged that the dam was situated partly in New Hampshire and partly in Maine. The evidence showed that it was entirely in Maine. It was held by Parker, C. J., that the gravamen of the indictment was the damage to the highway, and that

which the plaintiff designates for that purpose in the title of the complaint." But in *American Union Telegraph Co. v. Middleton*, 80 N. Y. 412, decided when the same provisions were in force, it was held that the action of trespass *quare clausum* was local in its character, and would not lie in New York for injuries to lands in New Jersey.

¹ Story, *Conflict of Laws*, § 551. That this rule extends to counties, see *in re Eldred*, 46 Wis. 530.

² *Mississippi & Missouri Railroad Co. v. Ward*, 2 Black, 484; *In re Eldred*, 46 Wis. 530.

³ For an exception to this rule, showing that the sovereign may make laws authorizing certain acts to be done out of the State, and prescribing their effect within it, and may make laws controlling his citizens when without the State, for the violation of which they may be punished within it, see *State v. Main*, 16 Wis. 398.

⁴ *State v. Lord*, 10 N. H. 357.

the variance as to the situation of the dam was immaterial. The correct rule was stated in New Jersey in the case of *State v. Babcock*.¹ There an obstruction was placed in the Hudson River, on the soil of New Jersey, but within the exclusive jurisdiction of New York, by compact between the two States, and an injury was caused in New Jersey. The Court held that the indictment could not be maintained in New Jersey.

§ 444. In equity the distinction between local and transitory actions is unknown, and as equity acts *in personam*, there is no obstacle of territorial jurisdiction to prevent the granting of equitable remedies for nuisances affecting land in another county or State. If the defendant is within the jurisdiction of the court, he can be controlled and prevented from injuring the property of another, wherever it is situated. This rule was applied by the court of New Hampshire to protect a mill dam. The complainants owned a dam in the river bounding the State, which extended across the river into the State of Maine. The defendant was a citizen of New Hampshire. It was held on a bill filed for that purpose that the court had jurisdiction to issue an injunction restraining the defendant from destroying the dam of the complainants in Maine.²

¹ *State v. Babcock*, 1 Vroom, 29, 32. Elmer, J., in delivering the opinion, said: "The case does not materially differ from a line between two States on the land which happens to be the scene of a busy population, where a manufactory near to that line in one State may be a nuisance to the citizens of the other, whose redress will have to be obtained from the tribunals of the State in which the nuisance is situate." This case is approved by Ryan, C. J. (*In re Eldred*, 46 Wis. 530), and the case of *State v. Lord*, criticised.

² *Great Falls Manuf. Co. v. Worsster*, 23 N. H. 462. In the similar case, *Stillman v. White Rock Manuf. Co.*, 3 Wood. & M. 538, 545, some re-

marks are made contrary to this. The court say: "The owners of the canal, the supposed wrong-doers, reside there, and an injunction issuing in another State or Circuit could not be executed there, it being a proceeding *quasi in rem*. The injured party then must be deprived entirely of this legal summary and useful species of redress, unless rights and jurisdiction to protect them exist beyond the centre of the stream." The court say, in another place: "The remedy by injunction is a specific one, or *quasi in rem*, and whether that nuisance be in fact situated in Rhode Island or Connecticut, it must be enjoined against wherever it is, and there alone, and by the laws existing there alone, it

§ 445. In the Federal courts the question has been considered both with reference to their own jurisdiction and that of the State courts. The decisions are not altogether harmonious. The judges speak of the courts in general terms, but such remarks must be taken to refer to the Federal courts,

must be abated, if at all." This is true as to abatement, as we shall see, but the court seem to proceed on an erroneous view of the nature of the equitable remedy. There might be difficulty in obtaining jurisdiction and control of the defendant, but it would not be because equity acts upon the *res*. The decision seems to confuse the injunction directed against the defendant *in personam*, forbidding him to maintain the nuisance, with a proceeding against the nuisance, *in rem*, to abate it. The case of *Morris v. Remington*, 1 Pars. Sel. Cas. Eq. (Pa.) 387, decided in 1849, two years before the case of *Great Falls Manuf. Co. v. Worster*, is also opposed to the doctrine in the text. The parties owned adjoining lands separated by a stream, in Montgomery County. The defendant cut a new channel for waters supplying the stream, upon his land, and thereby diverted water from his stream, and from the plaintiff's race. The plaintiff filed a bill in Philadelphia County for an injunction to prevent such diversion. The defendant demurred for want of jurisdiction. The demurrer was allowed and the decision sustained above. The court (*per King, P. J.*) said: "Broad as is the language of the text-writers and even of the courts, in regard to this position that equity, having possession of the person of the wrong-doer, acts without regard to the local origin of the tort, it is nevertheless true that proceedings in chancery are like proceedings in all other judicial tribunals, sometimes local and sometimes transitory. . . . The remedies in equity in cases of private nuisances, to be co-extensive with the wrong, must have

a triple aspect. They must include the restraint and prevention of a contemplated nuisance; the removal of such a nuisance when perpetrated before the action of the court has been invoked; and compensation in damages for injuries resulting from such nuisances in cases where restraint and removal falls short of doing entire justice to the party aggrieved. And to this extent fully has the action of courts of equity gone, in cases of private nuisances. To stop short of this would be an admission of a want of power in the court to give a perfect remedy to its suitor." He then discusses the difficulty and impossibility of awarding an issue upon damages, taking a view, and sending a writ of assistance into Montgomery County, and holds that on account of the impossibility of granting all forms of relief, equity will not take jurisdiction. In another place, he says: "It may be here aptly remarked that in reference to local actions respecting lands in Montgomery County, this court has no more jurisdiction than if they were in the county of Middlesex, in England." It is to be noticed that an injunction restraining a nuisance does not involve a transfer of possession, and therefore needs no writ of assistance; that the abatement in equity is accomplished by a decree *in personam*, directing the defendant to abate; that compensation in damages is not necessary to the granting of the other remedies, and, if granted, is also enforced by a decree *in personam*, and, if necessary, by confinement of the defendant for contempt, until it is performed.

except where a different meaning is plainly indicated. Where parties, residing on opposite sides of a stream, the boundary between Rhode Island and Connecticut, owned a dam and water-power in common, and the respondents, by another dam on the Rhode Island side, diverted water from the common water-power, it was held that the complainants in Connecticut had an easement in the water beyond the centre of the stream, that the injury occurred in Rhode Island, and that the remedy must be sought in the courts of Rhode Island, or if pursued in the tribunal of the general government, it must be in the district of Rhode Island, and not in that of Connecticut.¹ Woodbury, J., said: "If this view of the rights of the parties were not thus shown to be entirely sound, it might be reasonable in a case like this to hold a wrong-doer liable, either where the direct act is done, or where the consequential injury was felt." It was held in the Circuit Court that the several districts within its limits are to be treated as counties, and that the rule in *Bulwer's* case applies to them. An action was brought in the Circuit Court for the New Jersey district for damages to lands in Pennsylvania, caused by the wrongful diversion of a stream in New Jersey, and the court held that it was maintainable.² From this it follows that the action is maintainable in the Circuit Court in either district. So where A. diverted, in Connecticut, a stream of water which had its rise in Connecticut, and flowed into Massachusetts, so that it ceased to flow to B.'s mill, situated on the same stream in Massachusetts, the Circuit Court for the district of Connecticut held that it had jurisdiction of an action by B. against A. for the damage caused by the diversion.³ Ingersoll, J., in the opinion, cited the remark of Woodbury, J., given above, and added approvingly: "And

¹ *Stillman v. White Rock Manuf. Co.*, 3 Wood. & M. 538.

² *Rundle v. Delaware & Raritan Canal*, 1 Wall. Jr., 275. In *Slack v. Walcott*, 3 Mason, 508, the suit was to establish a prior right to the waters of the Pawtucket River, and to prevent its diversion. Story, J., said: "The wrong done by stopping the flow of the water

by any obstruction or drain in Rhode Island, is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both States, like the analogous case of an injury to land lying in one county by an act done in another county."

³ *Foot v. Edwards*, 3 Blatch. 310.

the cases which he puts clearly show that he so considered the law to be ;” *i.e.*, that the rule in Bulwer’s case applies to Federal districts.

§446. But the Federal District Courts are subject to the same limitation which prevents the State courts from taking jurisdiction of proceedings *in rem* over foreign nuisances. Such proceedings are local in any case, and can be brought only in courts which have jurisdiction of the thing ; that is, within the territorial limits of whose jurisdiction the nuisance is situated. Their power *in rem* extends to the boundaries of their districts and no further. So it is held in the Supreme Court of the United States that a suit to abate a nuisance is a local suit, and can be brought only in the district where the nuisance is situated.¹ The nuisance complained of was a bridge across the Mississippi between Illinois and Iowa, the boundary being the middle of the river. The channel used for navigation was on the Illinois side of the stream, and the alleged obstruction consisted of a pier for the drawbridge, which stood in this channel. The complainant filed his bill in the United States District Court for the district of Iowa, praying an abatement of the nuisance. Catron, J., in delivering the opinion in the Supreme Court, said : “ The complainant sued in the Federal Court because of his citizenship in a different State from the defendant ; and the United States District Court, holden in Iowa, exercised the same jurisdiction that a State Court of Iowa could have exercised, and no more. It had no power beyond the middle of the river. . . . It was at the long pier, and in the Illinois draw east of that pier that the complainant’s boats sustained the injuries on which he found his right to sue the Iowa corporation, and to proceed against the bridge *in rem* as a public nuisance. An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the Courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant’s boats giving him the privilege to sue and abate the obstruction was as local as the public right

¹ Mississippi Railroad Co. *v.* Ward, 2 Black, 485.

to indict." In the Federal courts, therefore, a suit for damages will lie, either in the district where the nuisance is committed or the damage is sustained, but proceedings *in rem* are maintainable only where the thing complained of is situated.

§ 447. Covenants which run with the land and relate to waters are enforceable by the action of covenant, by and against the assignees of the original parties. Thus a covenant by a lessor to supply the premises demised with water;¹ or, by a purchaser of land with a well or spring on it, to supply water to all houses on the vendor's land;² by a licensee to supply his licensor with pure water;³ by the grantor of a watercourse, for himself and heirs, to cleanse it;⁴ by tenants in common of a dam and water-power to repair their respective portions of the dam;⁵ by grantors of a mill to keep a dam in repair;⁶ by riparian owners on opposite sides of a stream to rebuild a dam held in common, in case of its destruction;⁷ to maintain in repair a dam or race;⁸ to repair a canal which drains the covenantor's lands, or to pay a proportional share of the cost of such repairs;⁹ to repair a

¹ *Jourdain v. Wilson*, 4 B. & Ald. 266. For a discussion of such a covenant, see *Kinney v. Watts*, 14 Wend. 38.

² *Cooke v. Chilcote*, 3 Ch. D. 694. The covenant was enforced in this case by an injunction against leaving the covenant unperformed. It was held to run with the land, but further, if it did not, it was held that it would bind a purchaser with notice. In *Kennedy v. Scovil*, 12 Conn. 317, a reservation of water for the use of a certain piece of property was held to save an assignable interest.

³ *Sharp v. Waterhouse*, 7 E. & B. 816. Or by grantor of power. *Sterling Co. v. Williams*, 66 Ill. 393.

⁴ *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27, pl. 4.

⁵ *Wilbur v. Brown*, 3 Den. 356.

⁶ *Thompson v. Shattuck*, 2 Met. 615; *Batavia Manuf. Co. v. Newton*

Wagon Co., 91 Ill. 230; *Fitch v. Johnson*, 104 Ill. 111.

⁷ *Linderman v. Lindsey*, 69 Penn. St. 93. In *Woodruff v. Trenton Water Power Co.*, 2 Stock. 489, the deed was held to be subject to a condition that the grantees erect and maintain a race-way and dam, a safe bridge and road, and the estate conveyed was held liable to forfeiture for non-performance; but the court said that if it were a covenant, it would be enforceable against assignees.

⁸ *Carr v. Lowry*, 27 Penn. St. 257; *Shaber v. St. Paul Water Co.*, Minn. 15 Reporter, 339.

⁹ *Norfleet v. Cromwell*, 64 N. C. 1. The covenant in this case expressly bound the parties and their heirs and assigns of land, and the action was brought to recover a proportional share of the cost of repairs against an assignee of one of the tracts of

sea-wall;¹ by a party to a conveyance, not to use water-power for a particular purpose;² by a lessor to permit a lessee to make a drain;³ by a grantor of lands, including part of a pond, with the grantee's purchaser, to draw off his pond on request for a certain time, and permit the covenantee to enter and remove mud;⁴ by tenants in common, on dividing property, reserving a raceway in common, each covenanting not to use more than one-half the water, and not to use it for boats larger than a given size, not to use it for mills, except on the tract of land divided, nor to use it for any mill employed in the manufacture of gunpowder;⁵ nor to diminish the volume of a stream;⁶ have been held to run with the land, and to be enforceable by the action of covenant.

§ 448. A conveyance of a privilege of drawing water from a pond is not a conveyance of land, and a covenant respecting the privilege is held not to run with the land, and is not enforceable in an action by an assignee of the grantee.⁷ Covenants by owners of separate mills in severalty, but drawing water from the same dam, limiting their uses of the stream, have been held in Massachusetts not to run with the land, or to bind a stranger purchasing one of the mills.⁸ The rule that where the grantor attempts to convey rights which

land. In a later action of covenant between the same parties, growing out of the same matter, it was shown that the canal did not in fact touch the lands in question. The court held that the covenant *concerned* land, within the second resolution in *Spencer's* case, and would bind an assignee with notice. *Norfleet v. Cromwell*, 70 N. C. 634.

¹ *Morland v. Clark*, L. R. 6 Eq. 252.

² *Norman v. Wells*, 17 Wend. 136.

³ *Target v. Lloyd*, 2 Vent. 277.

⁴ *Morse v. Aldrich*, 19 Pick. 449.

⁵ *Jamison v. McCredy*, 5 Watts & S. 129. The action here was on the case. In *Collins v. Plumb*, 16 Ves. 454, the question was raised whether a covenant not to sell or dispose of water

from a well to the injury of the proprietors of certain waterworks, their heirs, representatives, and assigns, ran with the land, but the case was on a bill in equity, and Lord Eldon, in sustaining the demurrer, remitted the parties to their rights at law. In *City of London v. Richmond*, 2 Vern. 421, the assignee of a covenant to pay rent for water furnished by a conduit, was held chargeable in equity; for the assignees might not be liable at law, if it was an incorporeal inheritance, for they had no privity of estate. Affirmed, 1 Bro. P. C. (Toml. ed.) 516.

⁶ *Shaber v. St. Paul Water Co.*, 15 Reporter, 339.

⁷ *Wheelock v. Thayer*, 16 Pick. 68.

⁸ *Hurd v. Curtis*, 19 Pick. 459.

he has not, the covenants are broken as soon as made and cannot be assigned, is illustrated by the conveyance of a privilege of drawing water, with a covenant to erect and maintain a dam ten feet high, with a warranty, when the grantor in fact had only the right to maintain a dam six feet in height.¹

§ 449. A license may be the subject of a grant and of a covenant running with the land. In an English case, A. and B. granted a license to C. for a term of years, to continue a channel open through the bank of a navigable watercourse, in order that waste water might pass to the mills of C., on payment of an annual sum. C. assigned to the defendant. B. died. A. brought suit for non-payment of the sum. It was held that, assuming A. and B. to be owners of the navigation, the deed would operate as a grant of interest in incorporeal hereditaments, within St. 32 Hen. VIII. c. 34, so as to make the defendant liable on the covenant as the assignee of the grantee. But as it appeared by the deed that the grantors were seized of the real hereditament only jointly with others, and that the power of granting the privilege was vested in all the owners, it was held that the deed operated only as a license to use the water, subject to the right of the other shareholders, and that the defendant was not bound by the covenant.²

§ 450. Devisees of equitable interests are not assignees within the rules on covenants running with the land, and are not liable in actions on the covenants. A covenantor sold to a municipal corporation water for grinding corn, and covenanted, for himself and those under him, not to obstruct or divert any part of the water. He then mortgaged his estate to A., and devised his equity of redemption to B. and T., who diverted water. The corporation brought an action

¹ *Wheelock v. Thayer*, 16 Pick. 68. In America it is held that covenants of seisin, and against incumbrances, do not run with the land (contrary to the rule in England). *Mitchell v. Warner*, 5 Conn. 497; *Rawle, Covenants for Title* (4th ed.), 89, 320, 333.

² *Portmore v. Bunn*, 1 B. & C. 694.

of covenant against them as assignees of all the estate of the covenantor. It was held that the defendants as devisees of an equitable estate could not be charged on the covenant as assignees.¹ A grantee of land with which a covenant runs, may, upon conveying the premises, reserve, by agreement, the right of action for breach of the covenant. A right of action on a covenant to repair a dam was so reserved in *Thompson v. Shattuck*, in a conveyance after the dam had been carried away; the covenantee repaired the dam, and it was held that he might maintain an action in his own name upon the covenant.²

§ 451. It has been said that covenants against incumbrances are broken by the existence of any easements or servitudes to which the land is subject.³ And this was undoubtedly the rule at common law. So a right to take water from the premises conveyed;⁴ a right to maintain an artificial watercourse;⁵ a right to maintain a drain, and an easement of entering to repair it;⁶ a right to obstruct and divert water by means of a dam;⁷ an easement of conveying water from a spring in pipes,⁸ and the right to maintain a dam, and overflow lands,⁹ have each been held breaches of covenants against incumbrances.

§ 452. In Massachusetts it is held that where an owner of an entire tract, which he overflows by means of a dam, conveys a portion of such overflowed land, he retains the right to continue such flowage without express reservation.¹⁰

¹ *Carlisle v. Blamire*, 8 East. 487.

² *Thompson v. Shattuck*, 2 Met. 615.

³ *Prescott v. Trueman*, 4 Mass. 627; *Mitchell v. Warner*, 5 Conn. 497, 508.

⁴ *Mitchell v. Warner*, 5 Conn. 497; *Harlow v. Thomas*, 15 Pick. 66; *Morgan v. Smith*, 11 Ill. 194.

⁵ *Prescott v. Williams*, 5 Met. 433. See *Prescott v. White*, 21 Pick. 341. But the right to the continued flow of a natural watercourse is not a breach, nor are the rights incidental thereto,

such as the right to enter and remove obstructions.

⁶ *Smith v. Sprague*, 40 Vt. 43.

⁷ *Morgan v. Smith*, 11 Ill. 194.

⁸ *McMullen v. Wooley*, 2 Lans. (N. Y.) 394.

⁹ *Lamb v. Danforth*, 59 Maine, 322; *Patterson v. Sweet*, 3 Brad. (Ill.) 550.

¹⁰ *Cary v. Daniels*, 8 Met. 466. This case was decided expressly on the ground that one who makes a prior appropriation of a stream thereby gains a priority of right as against ad-

This was followed in Vermont in the case of Harwood v. Benton.¹ There an owner of a mill and lands, including a dam and flowed land, sold a portion of the flowed land with a covenant against incumbrances. It was held that he did not part with the right to flow such land, and that the subsequent exercise of such right by himself and his grantees of the mill was not a breach of the covenant. Barrett, J., said: "Such covenant has relation to rights existing in, or in relation to, the property conveyed, appertaining to parties *other than* the grantor, and which may be claimed and exercised and enforced upon and against said property, as against such grantor and his assigns." Applying this narrow distinction it would follow that although the grantor might continue to exercise such right of flowage himself, yet if he had granted the right to another person to flow the land, and then had sold the land itself, the outstanding right to flow would be a breach of the covenant against incumbrances; and this would follow although the right to flow was openly and notoriously exercised before and at the time of the grant; but he might afterwards convey whatever right he had himself retained.

§ 453. The Supreme Court of New Hampshire have established a similar rule. In Dunklee v. Wilton Railroad Co.,² the court says: "Property conveyed passes in its existing state, subject to all existing easements and burdens of a similar nature *in favor of other lands of the grantor*, which are

jacent owners. But this is not everywhere the law. *Ante*, c. 9

¹ 32 Vt. 724.

² Dunklee v. Wilton Railroad Co., 24 N. H. 489. In this case the respective owners of the upper and lower land constructed by agreement an artificial raceway, shortening the course of a brook flowing through their lands, and the lower owner afterwards conveyed his land to the upper owner (the plaintiff), who, being then the owner of both the parcels, conveyed part of the lower land to a

third party. The grantee conveyed a portion of the land to the defendant, who erected an embankment across the watercourse, to the plaintiff's damage, and the court held that the plaintiff, by conveying away the land, had not lost the easement; that the raceway was not a breach of his covenant, or a nuisance which the owners of the land could remove; and that the plaintiff could maintain case for the injury. Confer Rawle, Covenants for Title (4th ed.), 109.

apparent, and which result naturally from the relative situation of the land, and from the nature, construction, and intended use of the buildings, mills, etc., upon it, and their situation and connection with other property, as they were usually enjoyed at the time of the conveyance." In this case no mention is made of that of *Kidder v. George*,¹ decided five years before in the same court, where it was held in an action of covenant that it is no breach of the covenant against incumbrances that the land, at the time of the conveyance, had been flowed by the grantor for twenty years by a dam below, and after the conveyance, was flowed as before.

§ 454. In Wisconsin the Supreme Court has gone further, and laid down the unqualified rule that purchasers of property, obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition, take it subject to such right, without any express exceptions in the conveyance, and that such easements are not breaches of covenants against incumbrances or other covenants for title.² So, where the defendant conveyed land to the plaintiff by a deed containing the usual covenants of seisin and against incumbrances, without any exceptions, and at the time of the purchase between thirty and forty acres of the land were flowed by a mill-pond created by a dam on land not belonging to the defendant, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question, and the grantee brought an action for breach of the covenants, by reason of the right of flowage, it was held that the action could not be maintained.³

§ 455. The decisions in Massachusetts, New Hampshire, and Wisconsin are influenced by the policy of those States in favoring mills and the development of water-pow-

¹ *Kidder v. George*, 18 N. H. 511.

Sabine v. Johnson, 35 Wis. 185; *Smith v. Hughes*, 50 Wis. 620).

² *Kutz v. McCune*, 22 Wis. 627 (approved in the cases of *Pomerooy v. Chicago Railroad Co.*, 25 Wis. 641;

³ *Kutz v. McCune*, *supra*. Confer *Janes v. Jenkins*, 34 Md. 1, accord.

ers;¹ but it is submitted that in so far as these cases hold that any such easements or servitudes upon land abridge the covenantee's right to the entire beneficial use of the property purchased, they are departures from the common law. They are, in short, a limitation upon the covenant, by reference to the subject-matter. The mere doctrine of notice is an insufficient ground for the departure, for the purchaser has notice of recorded incumbrances, such as mortgages and judgment liens, and buys with reference to them; but if he takes a covenant against incumbrances, he is entitled to damages for all such charges on the land, regardless of notice.²

§ 456. Covenants in private grants do not include protection against or compensation for future acts of sovereignty; and, accordingly, if lands conveyed are injured by an exercise of the power of eminent domain, such injury is not a breach of any of the covenants for title, and affords the covenantee no cause of action;³ and in States where the flowage of lands under the Mill Acts is held an exercise of the power of eminent domain, such flowage would not constitute a breach of the covenants.⁴ So an entry and occupancy in exercise of the power of eminent domain, for the purpose of building a canal, is not a breach of covenants of warranty, nor is a release of damages for such entry, executed before the conveyance is made.⁵

¹ See Rawle, Covenants for Title (4th ed.), 108, 113.

² See *Bean v. Mayo*, 5 Greenl. (Me.) 94, where a covenant in a deed that the land was free from incumbrances was held broken by the existence of a mortgage previously given by the grantor to the grantee.

³ *Ellis v. Welch*, 6 Mass. 246.

⁴ In *Fitch v. Seymour*, 9 Met. 462, the action was upon a covenant against incumbrances, and the alleged breach consisted of flowage of the lands by a third person under a license from the grantor, which had been held binding as against him. It was held that such license gave no such right as against the grantee, and that, therefore, there was no breach.

Shaw, C. J., took the occasion, incidentally, to say: "Strictly speaking, the right given by the mill acts to the mill owner is not that of flowing, or making any other direct use of his neighbor's land adjacent to the stream, above his own; but only to raise a dam on his own land to a height sufficient to raise a suitable head of water, and to continue the same to his own best advantage, although the land of another is thereby flowed. We do not, however, mean to say that a right to keep up such head of water without payment of damages may not, under some circumstances, be an incumbrance on the land."

⁵ *Dobbins v. Brown*, 12 Penn. St. 75. But where a lease of a mill and

§ 457. In Maine, where a corporation was authorized to erect dams, locks, etc., in a stream, and to take lands therefor, making compensation to the owners, and the company leased land, and erected a portion of their works thereon, no damages being claimed by the owner, or assessed, and the owner afterwards conveyed the land with covenants, it was held that the company had erected its works under its charter power, and had the right to maintain them permanently, and that they were a breach of the covenant against incumbrances.¹ If this case is law, it follows that an easement erected in the past, under the exercise of the power of eminent domain, is an incumbrance within the meaning of the covenant, which is a strict application of the original rule as to easements.

§ 458. The covenant of seisin is held to be broken by the existence of a prior grant to another of the right to divert a natural spring.² So where the deed included a grant of the right "to raise a dam sufficient to raise the water seven feet

water-power was made after the water had been taken for the temporary use of a canal company, and the lease contained covenants of warranty and against incumbrances, such abridgment of the full use of the property, under a *prior* exercise of the power of eminent domain, was held a breach of the covenant. *Peters v. Grubb*, 21 Penn. St. 455. This is plainly contrary to the New Hampshire and Wisconsin doctrine as to notorious easements.

¹ *Ginn v. Hancock*, 31 Maine, 42, 47. The court said: "The acts performed would have been unlawful if they had not been done by virtue of the Act. The presumption is that they acted lawfully. The company must be considered as acting by virtue of the same authority, in all parts of the river, while constructing connected works of improvement; and not as erecting one portion of such works by virtue of the Act, and another portion by a different right or authority,

merely because it was erected on land owned or occupied by it. The works must, therefore, be considered as erected and maintained by the company, by virtue of the Act, and as rightfully existing there as its property at the time of the conveyance. It is agreed that, 'no damages' for the premises in question were ever claimed or assessed under the act, and as there provided.' This fact does not deprive the company of the right to maintain those works. The defendant might have applied and have had any damages occasioned thereby to his reversionary interest assessed according to the provisions of the act. His neglect to do so cannot diminish the rights of the company. The land must, therefore, be considered as subjected to that servitude and as thereby incumbered at the time of the conveyance." Confer *Peters v. Grubb*, 21 Penn. St. 455, *supra*, accord.

² *Clark v. Conroe*, 38 Vt. 469.

high," with a covenant of seisin, it was held that the *habendum* and covenant of seisin extended to the right to maintain the dam, and were broken by lack of that right in the grantor.¹ A similar question arose in Vermont on a covenant of warranty. The defendant had conveyed a lot, including a mill-site and dam, simply as "lot No. 19"; *habendum*, etc., "with the appurtenances thereof," with a covenant to warrant and defend "the above granted and bargained premises." The plaintiff maintained the dam at its former height, and thereby overflowed lands above him, for which a recovery of damages was had against him. He then brought suit on the covenant against the grantor, alleging for breach the recovery against him. It not appearing that the dam had ever caused such flowage prior to the date of the defendant's deed, or that the defendant had ever exercised or claimed the right so to flow the land, it was held that no breach of the covenant was shown.²

§ 459. In a recent case in New York a different result was reached. The defendant and another conveyed to the plaintiff and another certain premises upon which were a mill, a dam and pond, which furnished water-power for the mill, and were essential to its complete enjoyment and operation, by a deed containing covenants of warranty and quiet enjoyment, but with no express covenant in regard to the water-power. The grantees entered into possession, and while working the mill with the dam at the same height as when the conveyance was made, were sued for overflowing the lands of an upper riparian proprietor by means of the dam. They gave their grantors notice to defend the actions, and judgments for damages were obtained against the grantees. They

¹ Walker v. Wilson, 13 Wis. 522; Hall v. Gale, 14 Wis. 54; s. c. 20 Wis. 292; Traster v. Snelson, 29 Ind. 96. In Stetson v. Veazie, 11 Maine, 408, it is held that an easement (in this case of landing boats on the shore of a stream) was not a disseisin of the owner of the land to which the easement is annexed (upon which it is exercised). So in McMullen v.

Wooley, 2 Lans. (N. Y.) 394, a grant of a prior right to conduct water by means of pipes laid beneath the surface of land, from a spring thereon, was held an easement, and not a breach of covenants of warranty and for quiet enjoyment, but a breach of the covenant against incumbrances.

² Swasey v. Brooks, 30 Vt. 692.

then brought an action upon their covenants, and it was held that the deed conveyed the dam as it then stood, at its existing and apparent height, and the water-power it thus indicated, which was an essential element in the value of the property, and that the judgment constituted an eviction and breach of the covenants.¹

§ 460. The paramount right to divert water from a spring was also held a breach of the covenant of warranty in the above case from Vermont.² But in *Mitchell v. Warner*³ it was held that a pre-existing right to divert water from water works, thereby rendering them useless, was not a breach of the covenant of warranty. This case is placed upon the ground that the water is not part of the freehold; but the common law was not so, and the decision has been criticized in Pennsylvania as ill-considered.⁴ In the last men-

¹ *Adams v. Conover*, 22 Hun (N. Y.) 424; s. c. 87 N. Y. 422; 25 Alb. L. J. 193. In the Court of Appeals, Finch, J., in speaking of the plaintiff, said: "He had a right to assume that it stood lawfully at its existing height, that his deed would pass it at the same height and allow him rightfully to maintain it unchanged, and so preserve to him the water-power which was the important and essential element of his purchase. . . . From the thing thus conveyed, itself covered by the deed and passing under it, the grantee was evicted by a paramount title. . . . The grantee, therefore, was not merely deprived of an easement in another's land which was not conveyed, and which his deed did not purport to convey, but he lost by force of the paramount title a thing actually conveyed, included within the metes and bounds of his deed, and just as much property granted by that conveyance as if it had been a particular acre of the land. Considering the subject-matter of the grant, the peculiar character of the property as a water-power and a mill-site, the existence of the dam at a height essential

to that power, and to the full enjoyment of the property, we hold that the deed conveyed the dam at its existing height, and the covenant of warranty was broken when the grantee was compelled in whole or in part to take it down." No mention was made of the case of *Swasey v. Brooks* in either court. For a decision distinguishing the case of a sewer over adjoining land from this, and holding that the covenants of warranty and for quiet enjoyment of the premises and appurtenances do not extend to the right to discharge water through such a sewer, see *Green v. Collins*, 86 N. Y. 246.

² *Clark v. Conroe*, 38 Vt. 469.

³ 5 Conn. 497. The case of *Thayer v. Wheelock*, 16 Pick. 68, before referred to, held similarly that the benefit of a covenant of warranty in a grant of the right of drawing water from a pond would not enure to a subsequent purchaser of the land.

⁴ See *Wilson v. Cochran*, 46 Penn. St. 229; Rawle, *Covenants for Title* (4th ed.), 182 (note 2); *Spencer's Case*; 1 *Smuth's Lead. Cas.* (7th Am. ed.), 201, note. In *Griswold v. Allen*,

tioned State, it was held that a covenant for quiet enjoyment in the lease of a grist-mill, operated by water-power, was broken by the diversion of the water of the stream under a prior right, acquired by a canal company under a delegation of the power of eminent domain.¹

§ 461. In *Blatchford v. Plymouth*,² certain allegations as to the use of water were held to show no breach of a covenant for quiet enjoyment. The defendants demised a mill and stream of water flowing in their trench, except so much of the water as should be sufficient for the supply of persons whom the lessor should already have contracted with, or should thereafter contract to supply, provided that such a quantity should be left as would be sufficient to supply the mill for twelve hours a day, with a covenant for quiet enjoyment. The breach assigned was that the defendants, at divers times between the execution of the lease and the bringing of the suit, had caused and procured to be drawn off large quantities of water. The evidence showed that nothing had been done since the execution of the lease; but it was shown that persons having rights under prior grants had diminished the quantity of water that might otherwise have flowed to the plaintiff's mill. It was held that the lease was not a demise of water for twelve hours a day, that the proviso for such quantity of water was a limitation merely on future grants, and that the diversions complained of were no breach of the covenant. In an action by a tenant on the covenants of his lease, for damages caused by the bursting of a water-pipe in the house, where the jury found that the pipe was reasonably fit and proper for the purpose for which it had been placed in the house, it was held that the bursting of the pipe was no breach of the covenant for quiet enjoyment.³

22 Conn. 89, it was held that a grant of the right to maintain a raceway would not include a grant of the right to use as much water as would flow through it; and that a prior right of another riparian owner, preventing

the grantee from using so much water, was not a breach of the covenant.

¹ *Peters v. Grubb*, 21 Penn. St. 455.

² 1 Bing. N. C. 691.

³ *Anderson v. Oppenheimer*, 5 Q. B. D. 602.

§ 462. A covenant in a conveyance of land intersected by water-races, that the courses should not be diverted, but should flow uninterruptedly in their present channels, and that the grantee should have access to their sources, to increase or improve the streams, and that the grantor would keep the races in repair over his other land, was held to impose the duty on the grantor of maintaining the races in such repair that water should continue to flow in them as freely as at the time of the grant, and to be enforceable in an action of covenant.¹ A covenant to convey land, together with the right to erect a dam and to overflow the land of the vendor, is not complied with by a tender of a deed for the land, omitting all reference to the easement; and on a failure to tender a deed containing grants of such rights, the covenantee may maintain an action of covenant.²

§ 463. By an instrument made under seal between the owner of a mill-dam and the owner of land flowed thereby, the owner of the dam stipulated that he would reduce his dam to a specified height, and covenanted for himself, his heirs and representatives, to keep the dam so reduced forever. The land-owner granted to the mill-owner, his heirs and assigns forever, the right to flow so much land as would be flowed by the dam at such height, but reserved the right to annul the grant whenever the dam should be raised above such height. The mill-owner lowered his dam, as agreed, but afterwards raised it again, and thereby flowed more land, to the injury of the other party, and for this injury suit was brought. The defendant contended that the covenants were dependent, and that he had a prescriptive right prior to the covenant. It was held that the covenants were independent, the mill-owner promising for the future, the land-owner granting *in presenti*; that the reservation of the right to annul the grant gave no election to the owner of the dam to raise it after having once reduced it to the height agreed, and furnished no defence to the action; and that whatever prescriptive right he might have had before the agreement was

¹ Carroll v. Cockey, 3 H. & J. 282.

² Wilson v. McNeal, 10 Watts, 422.

immaterial in an action for the breach of his covenant.¹ In *Tomlinson v. Ousatonic Water Co.*,² a covenant by the defendant to repair injuries which might be caused by flowage, recited simply in the condition of a bond for the performance of such covenant, was held a sufficient and valid covenant.

§ 464. *Underhill v. Saratoga Railroad Co.*³ was an action to recover possession of land, and also for damages for the breach of certain covenants. A grant was made to a railroad company upon the condition that the grantees should build and maintain a water-tight embankment or dam over a certain brook crossing the land conveyed for part of their line of road, and that the said embankment or dam with the flood-gates and sluice-ways therein might be used for hydraulic purposes by the grantors, their heirs, and assigns; and it was covenanted that the grantees should not be liable for any damages which the grantors should sustain in case of a break in the dam or an overflow thereof, unless the same should happen through the gross negligence or wilful misfeasance of the grantees, but that the grantees should forthwith repair all damages which the dam or embankment should at any time maintain. The grantees took possession and built their road, but omitted to build the dam. The grantors assigned all their rights to a third person, who brought the suit. It was held that the condition was subsequent, that the effect of the deed was to vest the fee-simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition; that a right of re-entry remained in the grantors and their heirs; but that no action could be maintained by the assignee for the possession of the land. It was further held that there was no express covenant in the grant except the one to repair; that the condition as to the erection and maintenance of the dam did not raise an implied covenant so to do; and that

¹ *Stinson v. Gardner*, 33 Maine, 49.

³ 20 Barb. 455.

² *Tomlinson v. Ousatonic Water Co.*, 44 Conn. 99.

by the assignment the condition was discharged forever, and an indefeasible estate was vested in the grantees.¹

§ 465. Where property was conveyed together with the right of taking water by a race from the grantor's pond, with a warranty of the title to the land and right of taking water, and suit was brought on the covenant, the breach charged being that during a specified period of time the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others, it was held that the plaintiff was not limited to proving acts committed during the period alleged, but might prove previous acts, in consequence of which the injury was sustained during the time.²

§ 466. In *Fish v. Folley*,³ the action was on a covenant that the plaintiff should have a continued supply of water for his mills from the defendant's dam. The defendant after a time wholly failed to perform his covenant. It was held that the breach was entire, and that one recovery was a bar to any further action. But in *Crain v. Beach*,⁴ which was an action on a covenant for maintaining a gate, a contrary rule is laid down; and *Fish v. Folley* is explained as decided with reference to the fact that a new water-power had been obtained, and the one in question abandoned several years before the suit.

¹ It is to be noticed that the condition was to maintain as well as to construct a dam. The court (*per Allen, J.*) say (p. 460): "There was no limit to the time of its performance, and consequently the defendants would be allowed a reasonable time to construct and complete the work." *A fortiori* there was no limit within which the condition for maintaining the dam was to be performed. The right of re-entry, therefore, was annexed to a continuing condition without limit in time. That such an interest is not void for remoteness within the rule against perpetuities, see

Brattle Square Church v. Grant, 3 Gray, 142, 148; *Crocker v. Old South Society*, 106 Mass. 479. A suggestion *contra* is made by Mr. Lewis (*Perpetuities*, 619).

² *Hollingsworth v. Dunbar*, 5 Munf. (Va.) 199.

³ *Fish v. Folley*, 6 Hill, 54.

⁴ *Crain v. Beach*, 2 Barb. 120. This case is limited in *Shaffer v. Lee*, 8 Barb. 412; and *Fish v. Folley* is cited generally in New York as an authority for the rule that a right of action cannot be divided. It must be considered with reference to the explanation given in *Crain v. Beach*.

§ 467. It is a general rule that in actions upon covenants, where there can be but one breach there can be but one recovery, and such recovery must include entire damages for the permanent injury done. This rule was applied in *Jacobs v. Davis*¹ to the case of the breach of covenants as to the construction and use of a trench. Where, on a breach of covenants for title, the breach is but partial, as of the waters of a stream supplying the land conveyed, the damages will be apportioned to the measure of value between the property lost and that preserved.²

§ 468. A covenant in a lease of water-power, to use due diligence in furnishing water-power, is a proper matter for set-off in an action on a promissory note and account for rent; and it has been held that a deduction from the rent for an obstruction of the power, under a clause in the lease providing for a rebate of rent for a stoppage of water, was no bar to an action on such covenant.³ But where a lease of

¹ *Jacobs v. Davis*, 34 Md. 204.

² *Dalton v. Helm*, 8 Nev. 190. In *Jacobs v. Davis*, just cited, A., B., and C. owned, in severalty by separate titles, certain tracts of swamp lands adjacent to one another. By a sealed instrument signed by them all, A. and B. agreed to let C. cut a ditch through their respective lands, and C., in consideration of this permission, covenanted that he would not allow D., an adjacent owner, or anyone who might thereafter own the adjacent land of D., to cut ditches in C.'s land so as to drain through the ditches by the agreement granted; C. further agreed to cut the ditch by a particular line, and not to open it and let water flow through it until provision was made for carrying it away below. On breach of the covenants by C., A. brought suit without joining B. as co-plaintiff. C. demurred on the grounds that the covenant was joint, the breach was insufficiently assigned, and that the covenant not to allow the ditches to be used for the land of D. was against public policy. It was held that the

agreement was valid, and that the covenants were several. The court also held (relying on 1 Wms. Saund. 154, note 1, to *Eccleston v. Clipsham*) that though the parties covenanted jointly, yet as the interest and cause of action were several, the covenant should be taken so, and separate actions allowed. The allegation of breach, that C. did cut the said ditch so as to throw the water down before it could be taken off by the ditch below, was held a sufficient assignment of breach in that respect. And an averment that C. allowed the owner of the said lands of D. to cut a ditch into the lands of said C., so as to drain through the said ditches, was held sufficient without naming the owner. It was held, also, that if C. entered on the land of A. under the agreement, and began cutting the ditch, he must cut it as agreed, and could not defend on the ground that he had no deed, but should have tendered a deed for execution if he thought it necessary.

³ *Moline Water Power Co. v. Waters*, 10 Brad. (Ill.) App. 159. Where

water-power provides in a plain way for an abatement at specified rates for every failure of water, the tenant is confined to the remedy so specified; a covenant that the lessor will repair will not be implied, and the tenant cannot counterclaim for the cost of repairs made by himself.¹

§ 469. Where a contract under seal has been modified, and a simple contract substituted, upon a valid consideration, the remedy for a breach of contract after such modification is by assumpsit, and not in covenant.² Where the rights of parties in respect of water are the subject of a simple contract, express or implied, assumpsit is the legal remedy for the breach of such contract.³ So where, after a wrongful diversion and recovery therefor, a lease of the use of the water was given and accepted, and rent paid, and parties claiming under the lessee held over after its expiration, it was held that the assignee of the reversion could maintain assumpsit against them for the use and occupation.⁴

§ 470. Where a co-tenant uses more than his share of a mill or water-right, it is presumed *prima facie* to be done with the consent of his co-tenants, and the law implies a promise to pay for such excess. But if such presumption is rebutted, and there is no promise, and nothing to show the relation of landlord and tenant, the other co-tenants cannot maintain assumpsit against him for the use and occupation. Where the joint owners of a mill, excepting P., who refused to unite with them for that purpose, rebuilt a mill, and retained P.'s share to reimburse themselves for expenses incurred for him

the land beneath the pool and inlet furnishing the power had been ceded by the lessor to the United States government, which had agreed to maintain the power out of appropriations that might be made by Congress for that purpose, and which had entire control over the power, it was held that the covenant "to use due diligence in providing water" did not require it to remove accumulations of sediment in the pool, impairing the power, but

only to use due diligence in attempting to procure such removal by the United States. *Ibid.*

¹ *Sheets v. Selden*, 7 Wall, 416...

² *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

³ *Davis v. Morgan*, 4 B. & C. 8; s. c. 6 Dowl. & Ry. 42; *Turner v. Strange*, 56 Texas, 141.

⁴ *Davis v. Morgan*, 4 B. & C. 8; s. c. 6 Dowl. & Ry. 42.

in rebuilding it, refusing to give him his share until reimbursed, it was held that P. could not maintain assumpsit against them, as the holding was adverse.¹

§ 471. It was early settled that ejectment would not lie for a watercourse.² But it of course lies for land covered with water, and the recovery will include all incidents of the land, and the action may be used to try the title to a water-right.³ Where the rights of the State in public waters begin with low-water mark, and owners of lands bordering thereon have a statutory right to build into the water, they cannot maintain ejectment for land artificially made in front of their own land.⁴

§ 472. In a proper case, an injury done to or by means of waters may be remedied by the extraordinary writ of man-

¹ Porter v. Hooper, 11 Maine, 170.

² Challenor v. Thomas, Yelv. 143; s. c. Brownl. & Golds. 142.

³ Beidelman v. Foulke, 5 Watts, 308.

⁴ Austin v. Rutland Railroad Co., 45 Vt. 215. In Iowa, it is held that owners of land bounding on a navigable river own the fee only to high-water mark. Under this doctrine it is held that an act of Congress subsequently declaring that a river formerly held navigable is not navigable, will not have the effect to extend the ownership of such persons to the center of the stream, so as to enable them to maintain ejectment against parties claiming land that forms part of the bed of the river. Wood v. Chicago Railway Co., 15 N. W. Rep. 284. But the State may maintain ejectment for land which was below high-water mark in navigable waters and arms of the sea, which have been filled up and made hard land. People v. Mauran, 5 Denio, 389. The right of the riparian proprietor to land below high-water mark is a right to a tangible corporeal hereditament which may be vindicated against a disseisor by this action. Nichols v. Lewis, 15

Conn. 137. But the action will not lie for a mere privilege of a landing place held in common with other citizens of a town. Black v. Hepburn, 2 Yeates, 331. If a grantor reserves to himself, his heirs, and assigns forever "the right and privilege" of erecting a mill-dam at a certain place described, and "to occupy and possess the aforesaid premises, without any let, hindrance, or molestation" from the grantee or his heirs, he has such an interest in the land reserved as will enable him to maintain ejectment. Jackson v. Buel, 9 Johns. 298. The action may be maintained for a fishery. Rex v. Old Arlesford, 1 T. R. 358, per Ashurst, J.: "There is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it; and it may be recovered in ejectment." Denying the doctrine of Molineaux v. Molineaux, Cro. Jac. 144; Herbert v. Laughllyn, Cro. Car. 492; Waddy v. Newton, 8 Mod. 275, 277. See ante, § 185. Ejectment will lie for a well of salt water, or for a right to a certain quantity of the water to be taken from a certain well. Smith v. Barret, 1 Lev. 114; Cro. Jac. 150; Runnington on Ejectment, 131.

damus. It has seldom been employed in cases of such injuries, and an extended discussion of its nature and uses may therefore be omitted. It may, however, be briefly stated that the essentials of a proper case for its exercise are, first, a specific legal duty due to the relator from a specific person or body; and secondly, the absence of any other remedy by due course of law.¹ By "due course of law" is here meant the entire system of remedies administered by courts, including remedies in equity.²

§ 473. An obligation arising merely upon a contract and not involving any trust,³ or an obligation to pay damages for a tort,⁴ will not be ground for a mandamus; nor will the existence of a nuisance for which a complete remedy may be had by indictment and judicial abatement.⁵

§ 474. The exercise of official discretion, as by municipal bodies, boards of health, or commissioners of highways, will not be controlled by the writ.⁶ But an official trust to perform a specific duty, or a public trust imposed on a private corpo-

¹ High on Extraordinary Legal Remedies, § 10.

² In *Commonwealth v. Supervisors*, 29 Penn. St. 121, it was held that mandamus would not lie where the relator had a full and adequate remedy by injunction. But in *Commonwealth v. Commissioners of Allegheny*, 32 Penn. St. 218, 223, it is said that the existence of an equitable remedy is not ground for refusing mandamus.

³ *State v. Republican River Bridge Co.*, 20 Kansas, 404. So where the State received a grant of land from the United States, for bridge purposes, and gave a guaranty to erect and maintain a bridge at a certain place, and then procured the erection of a bridge at that place by a company, accepted the bridge and took from it a guaranty to protect the State against loss upon its guaranty to the United States, it was held that the obligation of the company to repair the

bridge was merely contractual, and could not be enforced by mandamus. To same effect, see *State v. Zanesville Turnpike Co.*, 16 Ohio St. 308.

⁴ So one who has a claim for compensation against a local board of health, for injuries not specially authorized, has a remedy by action, and cannot have a mandamus. *Regina v. Darlington Board*, 6 B. & S. 562.

⁵ *Reading v. Commonwealth*, 11 Penn. St. 196.

⁶ High on Extraordinary Remedies, § 42; Dillon, *Municipal Corporations*, § 836. So of a discretionary power to erect and repair bridges. *State v. Freeholders of Essex*, 3 Zab. (N. J.) 214. A discretion as to erecting a bridge is not determined by levying and collecting a tax for that purpose; and the commissioners will not be compelled by mandamus to complete the bridge. *State v. Commissioners*, 31 Ohio St. 211.

ration may be enforced by mandamus. Thus, in California, canal companies organized under a general statute relating to such companies are held to be charged with a public trust, so long as they have water, to supply with water all those included in the classes for whose alleged benefit the companies were created; and this duty is enforceable by mandamus.¹ So where a company was authorized by Act of Parliament to divert rivers and watercourses, and under this authority the company raised the level of a brook, causing the flooding of a mine, it was held that the persons injured might have a writ of mandamus to compel the payment of compensation under the Act; and that if the injuries were caused partly by acts done under the powers of the statute, and partly not, the remedy was by mandamus, and not by action at law.² But it is always open to the company to show full compliance with the act, in answer to the writ; as in a case where a company was required to make ponds and watering-places for cattle, where, by means of the railway, the cattle of persons occupying lands adjacent thereto were deprived of access to former watering-places.³

§ 475. As the rights infringed by injuries done by and affecting waters are property rights, it is necessary for the plaintiff to allege an interest in the property injured, and an injury to such interest, in order to show a cause of action.⁴ The nature and extent of his interest need appear only so far as to show that it is injured by the wrong charged. Where the law gives a common right, as of navigation or fishing in public waters, it is unnecessary to state such right specially; but if the plaintiff claims more than he is entitled to of common right, he must allege his title to the right which he claims.⁵ Rights infringed by private nuisances fall within the latter class.

¹ Price v. Riverside Co., 56 Cal. 431.

² Queen v. North Midland Railway Co., 2 Rail. Cas. 1.

³ Queen v. York & North Midland Railway Co., 3 Rail. Cas. 764.

⁴ Leeds v. Shakerley, Cro. Eliz. 751; 1 Com. Dig. 308, Action for Nuisance, E.

⁵ 1 Chitty Pl. 393; Gale on Easements (5th ed.), 668. So where a plaintiff declared that he was pos-

§ 476. If the injury is to the possession, a general averment of the plaintiff's possession is sufficient, without any special statement of his title;¹ for, as we have seen, possession is a sufficient interest to maintain an action against a wrong-doer.² If, for example, the injury is by diverting or polluting a stream, the plaintiff should aver that he was possessed of the property injured, and that by reason thereof he was entitled to the flow of a stream to his land, or to the flow of a stream of good quality in its natural purity.³ Seisin in law is a sufficient interest to maintain the action. So, if one avers the seisin and death of his father, and a descent to the plaintiff, whereby he is seized, it suffices without alleging an entry;⁴ and so if one alleges that he is "seized in his demesne as of fee," possession will be implied.⁵

sessed of a house and was thereby entitled to an easement to take water from a cistern, but that the defendant wrongfully closed and fastened up a doorway, and thereby prevented the plaintiff from having access to the cistern and taking water, it was held that, if the declaration had alleged generally a right to use the cistern, and had complained that that right was interrupted, it might have been good; yet as it had stated the particular mode of obstruction by fastening the door, the plaintiff was bound to allege a right to pass through the door, for the lack of which the declaration was bad. *Tebbutt v. Selby*, 6 A. & E. 786. See *Gale on Easements* (5th ed.), 669. And where a count for polluting the waters of a canal which supplied boilers on the plaintiff's land, alleged that the plaintiff enjoyed the benefit of the water for that purpose, and that the water used and ought to run and flow without being fouled and polluted, it was held bad on the ground that it did not show that the plaintiffs were entitled to the flow or enjoyment of the benefit of the water. *Laing v. Whaley*, 3 H. & N. 675, 901; reversing 2 H. & N. 476.

¹ *Sly v. Mordant*, 1 Leon. 247; *Jackson v. Savage*, Skinner, 316; *Sand v. Trefuses*, Cro. Car. 575; *Glyn v. Nichols*, Comb. 43; *Rutland v. Bowler*, Palm. 290; *Heblethwaite v. Palmer*, Carthew, 85; 3 Mod. 48; 3 Lev. 133; *Fentiman v. Smith*, 4 East, 107; *Bealey v. Shaw*, 6 East. 208; *Northam v. Hurley*, 1 El. & Bk. 665; *Hoare v. Dickinson*, 2 Ld. Raym. 1568; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 432. See 2 Wm. Saund. 115, note 1 (to *Coryton v. Lithebye*). In an anonymous case, Cro. Car. 499, which was an action for diverting an ancient watercourse, it was held unnecessary to show title by prescription or otherwise.

² See *Ante*, § 377.

³ For precedents of forms of declaration for injuries affecting waters and watercourses, see 2 Chitty Pl. (16th Am. ed.), 624-631; 2 Chitty's Precedents, 600-610.

⁴ *Russell v. Handford*, 1 Leon. 273.

⁵ *Hart v. Evans*, 8 Penn. St. 13. *Coulter, J.*, here said: "The possession of the plaintiff below is sufficiently set out. The averment is that the plaintiffs were at the time of the torts committed 'seized in their demesne as of fee.' Seisin includes posses-

§ 477. The plaintiff's possession must be alleged to be at the time of the wrong done; but possession at the time of action brought is unnecessary, and the averment "*still is possessed*" may be rejected as surplusage.¹ While the plaintiff is at liberty to declare generally upon his possession, yet if he undertakes to set out a title, and does it insufficiently, the declaration is bad.² But an allegation that the plaintiff is entitled to the use of water in a convenient and customary manner is held not an allegation of a prescriptive right to be proved; and in a complaint for the unreasonable detention of water, the averment that the plaintiff is entitled to use the stream without hindrance or interruption is held not a declaration upon an exclusive right, but only the right incident to the ownership of land through which the stream passes.³

§ 478. The plaintiff must state his title sufficiently, if at

sion. It is true there is also seisin in law, and that would be sufficient to maintain this action; and actual and corporal seisin. But when an individual avers that he was seized, we may take it for granted that he was in possession, as the words will import that state of facts. But I am not to be understood as intimating that it was necessary to state an actual *pedis possessio*, or to prove it, in order to enable the plaintiffs to maintain this action. It was an injury to the freehold as well as to the actual possession." This case seems to hold (1) that the averment of seisin will be taken to imply possession; (2) that seisin in law is sufficient to maintain the action *for injuries to the freehold*; and is apparently pregnant with the proposition that seisin in law is not sufficient to maintain the action *for injuries not affecting the freehold*. The injury in the preceding case was diversion from a mill, necessarily affecting the freehold. But where the plaintiff attempted to charge the defendant with the duty of cleansing a drain, it was held that the words "owner and

proprietor" did not import that the defendant was the occupant of the premises. *Russell v. Shenton*, 3 Q. B. 449.

¹ *Vowles v. Miller*, 3 Taunt. 137. So where the plaintiff alleged that his watercourse ran through his land prior to the injury, without alleging a continuance of the flow, it was held that the continued flow would be presumed. *Stone v. Bromwich*, Yelv. 161.

² *Dorne v. Cashford*, 1 Salk. 363; *Crowther v. Oldfield*, 1 Salk. 365; 2 Ld. Raym. 1225, 1230. And see 1 Wms. Saund. 346 a (note to *Mellor v. Spateman*); Notes to Saund. 625; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 432.

³ *Twiss v. Baldwin*, 9 Conn. 291. See *Avon Manuf. Co. v. Andrews*, 30 Conn. 476. At common law a verdict would cure a title imperfectly stated, but would not cure a defective title, or the omission to state any title. 1 Wms. Saund., notes to *Stennel v. Hogg*; 2 Wms. Saund., notes to *Barber v. Fox*.

all, but is not bound to prove the same title as he alleges; "for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed."¹ But he is required to prove the right which he alleges is infringed, as laid. Where the plaintiff declared that he was possessed of a mill, whereby he was entitled to enjoy a watercourse which had been accustomed to flow to his mill, and the evidence showed that he owned land along an ancient stream, but that his mill was a new mill, as to which the jury found no right, it was held that the declaration would not support a recovery. The right declared on was that of an ancient appropriation; the right proved was that of an ordinary riparian proprietor, which in no way supported the declaration.² Where the plaintiff in case for diversion alleged, as a reversioner, a right to the flow of water to three ponds, and the evidence showed that he had an immemorial right to the flow of water to an ancient pond, but had turned the water into three new ponds, and that his right in respect to these was barred by an outstanding life estate, it was held that he might recover under the declaration in respect of his right to the flow of water to the ancient pond.³ In averments describing his right great accuracy was required of the plaintiff, and any substantial variance was held fatal to recovery. A general description of the course of a stream was sufficient, but if he attempted to describe it by metes and bounds, he must do it accurately.⁴ Where he declared that he was entitled to all the water above a certain mark, whereas he was only entitled to the surplus of such water, after a prior use, the variance was fatal;⁵ and the same rule was applied where the plaintiff described a dam as located below his land, and it was proved to be adjoining and partly on his land.⁶ So an averment that the plaintiff was possessed of land, by reason of which he had a right to the use

¹ Buller, N. P. 76, 7th ed.; *Ferrer v. Johnson*, Cro. Eliz. 336. "He must prove the same right, but he need not prove the same title." Gale on Easements (5th ed.), 672.

² *Frankum v. Falmouth*, 2 A. & E. 452; 4 Nev. & Man. 330.

³ *Hale v. Oldroyd*, 14 M. & W. 789.

⁴ *Hall v. Swift*, 6 Scott, 167.

⁵ *Wilbur v. Brown*, 3 Den. 356.

⁶ *Brown v. Woodworth*, 5 Barb. 650.

of water running in a tunnel to his mill, is not supported by proof that the tunnel was on the defendant's land, and that the plaintiff was using the water under a parol license and contract to convey.¹ But where the plaintiff alleged a greater right than he possessed, but of the same kind, the variance was not fatal. So where the plaintiff alleged that he was entitled to the free course of the stream, and that the defendant unlawfully increased the height of his dam, and inundated the plaintiff's mill, and the evidence showed that the parties' rights were subject to an agreement that during a scarcity of water the defendant was entitled to all the water during three days out of four, and the plaintiff to all the water on the fourth day, it was held that the injury to the plaintiff on the days when he was entitled might be proved under the declaration.² In most of the States as well as in England, the statute of amendments is so liberal that the distinctions as to variance have become unimportant.³

§ 479. It is settled in both countries that the reversioner must state the nature of his interest, and allege an injury of such a character as to be necessarily injurious to the freehold, or else must aver in terms and prove that the act complained of injures his reversion.⁴ Where the plaintiff declared as a

¹ *Fentiman v. Smith*, 4 East, 207. See *Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783. So an allegation that, by reason of a dam, substances brought down the stream were collected and corrupted the water, was held sustained by proof that the injury resulted from the alternate rise and fall of the stream, and from the action of the sun upon the water. (Bronson, J., dissenting.) *People v. Townsend*, 3 Hill (N. Y.) 479. Where a petition alleged a contract in writing respecting lands on the southwest bank of the Sabine River, and the contract when produced was found to describe the land as on the Sabine River only, it was held that there was no variance, as the petition did not

purport to recite the words of the contract and the descriptions did not vary as to the locality of the action. *Sublett v. Kerr*, 12 Texas, 366. An averment that the plaintiff's mill, alleged to be obstructed, is "on" the watercourse does not amount to an allegation that he is a riparian owner, which would be at variance with the extent of his real ownership. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

² *Burdick v. Glasko*, 18 Conn. 494.

³ For the English statute, see L.R. 10 Gen. Sts. 102 (Judicature Act of 1875; 38 and 39 Vict. c. 77, Order xxvii).

⁴ *Jackson v. Pesked*, 1 M. & S. 234; *Hale v. Oldroyd*, 14 M. & W. 780. And see *Alston v. Scales*, 9 Bing. 3; *Baxter v. Taylor*, 4 B. & Ad. 72;

reversioner of lands and buildings, which were injured by the defendant who had the lands adjoining, by erecting overhanging walls, it was held that the plaintiff must allege specifically that it was to the damage of the reversioner, or must state an injury of such a permanent nature as to be necessarily injurious to the reversion; and the allegations in that case (merely charging the injury by overhanging eaves, and not using the term reversion) were held insufficient.¹ In Massachusetts, in an action on the case for obstructing the plaintiff's use of his mills, the declaration alleged that the mills were leased, and that in consequence of the obstruction the tenants had threatened to quit, and the plaintiff had therefore been compelled to make a reduction in his rents. It was held that the declaration was sufficient, but that the last averment was necessary to show an injury to the reversion.²

§ 480. Where the plaintiff has different interests in possession and in reversion, he may recover in one action for an injury affecting both; but where the common-law system of pleading is retained, he must insert separate counts.³ Where the plaintiff declared in case for obstructing a stream and injuring his ferry franchise, and the declaration contained two counts, one by the plaintiff, as in possession, and the

Metropolitan Association v. Petch, 5 C. B. N. S. 504; *Baker v. Sanderson*, 3 Pick. 348; *Noyes v. Stillman*, 24 Conn. 15. See *Sumner v. Tileston*, 7 Pick. 198; and *Tinsman v. Belvidere Railroad Co.*, 25 N. J. L. 255. The rule in *Jackson v. Pesked* is stated and followed in *Davis v. Jewett*, 13 N. H. 88, and *Potts v. Clarke*, *Spencer* (N. J.) 536.

¹ *Jackson v. Pesked*, 1 M. & S. 234.

² *Baker v. Sanderson*, 3 Pick. 348. Where the plaintiff had by descent a share in the reversion of his father's lands, and had purchased the shares of the other heirs, and the widow held for life, he brought an action on the case for an injury to the land caused

by stopping a watercourse flowing through it. He declared as "seized and possessed," and there was evidence that he held as tenant at will. *Shaw, C. J.*, held that he could maintain case for the injury and that he had sufficiently set forth his interest to recover for the damages to the reversion. *Ashley v. Ashley*, 4 Gray, 197. In *Sumner v. Tileston*, 7 Pick. 198, the declaration was in the same form, and the plaintiff recovered for present injury.

³ *Baker v. Sanderson*, 2 Pick. 348; *Davis v. Jewett*, 13 N. H. 88. In *Ashley v. Ashley*, *supra*, n. 2, and in *Woodbury v. Willis*, 50 Maine, 403, the recovery seems to have in-

other as a reversioner for the injury to his reversionary estate, both counts were held good on general demurrer.¹

§ 481. In an action on the case for a nuisance, the injury may be alleged generally without describing the manner in which it was done.² Thus, in an action for diverting water and impeding navigation, Lord Ellenborough said: "It is sufficient to describe the substance of the injury in order to give the other party notice of what he is to defend; and it is sufficient in the form of pleading to allege the gravamen at any place within the body of the county."³ Allegations of nuisance must be such allegations of fact as to show the nature of the nuisance on the face of the declaration, or it will be open to demurrer.⁴

§ 482. At common law the plaintiff was bound by his own averments, and if he particularly described the alleged tort, he must prove it as described, and any substantial variance was ground for non-suit.⁵ So at the present day, the plain-

cluded damages to the present enjoyment and to the reversion, but no mention is made of more than one count.

¹ *Patrick v. Ruffners*, 2 Rob. (Va.) 309.

² 1 Chitty Pl. 406; Com. Dig. Action on the Case for Disturbance B (1); Anon., 3 Leon. 13; *Prickman v. Tripp*, Skin. 389. In an anonymous case, in 1 Ld. Raym. 452, it was held that such a general averment of obstruction was good after verdict, but it was questioned whether it would be good on demurrer.

³ *Mersey & Irwell Navigation Co. v. Douglas*, 4 East. 497. In *Tebbutt v. Selby*, 6 A. & E. 786, 793, *Patterson, J.*, said: "If the charge were simply that the use was obstructed, I think that would not be enough; such an allegation might mean an imprisonment, or any other way of impeding." But the common law is undoubtedly as stated by Lord Ellenborough. See *Stein v. Ashby*, 24 Ala. 521.

⁴ 2 Saund. Pl. & Ev. (5th Am. ed.), 471; Anon., Ld. Raym. 452. So in an action against an upper riparian owner for diverting a stream, the plaintiff must allege diminution and injury to himself. *Burden v. Mobile*, 21 Ala. 309. A complaint alleging the wrongful cutting of a ditch and the consequent flowage of the plaintiff's premises was held good on demurrer. It described the injury with sufficient certainty, and there was nothing to show that the flowage was by surface-water (which would not be a cause of action). It was not necessary for the plaintiff to deny that the flowage was by surface-water. *Ramsdale v. Foote*, 55 Wis. 557. It is a variance to declare for the destruction of a natural watercourse, and to prove at the trial damages by the flow of surface-water. *Munkers v. Kansas Railroad Co.*, 10 Mo. 334. See *Illinois Railroad Co. v. Fehringer*, 82 Ill. 129.

⁵ 1 Chitty Pl. 407.

tiff cannot allege one kind of nuisance and prove another.¹ Where the owner of a paper-mill declared that earth, sand, and other substances were washed into his mill-dam, and so filled and choked the pond as to make it in a great degree useless to him in the working of his mill, it was held that under this count he could not prove that the acts complained of made the water useless for washing rags.² So in the description of the injury, an allegation that the defendant placed obstructions in a ditch has been held not proved by evidence that materials were placed near the ditch, which were afterwards trodden and fell into the ditch.³ And a count for diverting water has been held not sustained by proof of penning it back and causing it to overflow the plaintiff's meadow.⁴ But a count for diverting water and preventing it from running along its usual course has been held sustained by proof that the water was prevented from being regularly supplied to the plaintiff's mill, although there was no diversion from the mill.⁵

§ 483. If there is a defective statement of a valid claim, but the statement renders it necessary to establish facts, which if established would support the claim in the writ, the defect, though it might be fatal on demurrer, is cured by the verdict.⁶ Where the complaint was for wrongful diver-

¹ O'Brien v. St. Paul, 18 Minn. 176.

² Ellicott v. Lamborne, 2 Md. 131. See *ante*, § 346.

³ Fitzsimmons v. Inglis, 5 Taunt. 534. In an early case, it was held that a count for breaking the bank of a stream was not sustained by proof of breaking a dam. Biccot v. Ward, Hob. 193.

⁴ Griffiths v. Marson, 6 Price, 1.

⁵ Shears v. Wood, 7 Moore, 345. But where the plaintiff declared that he was possessed of an adjoining close used as a private road, and that the defendant constructed a sewer in his close, and thereby diverted water from the plaintiff's pond, Tindal, C. J., held that the averment that the defendant's close was used as a road

was immaterial and need not be proved. Dukes v. Gostling, 1 Bing. N. C. 588. The Common Law Procedure Act of 1852 (15 and 16 Vict. c. 76, Schedule B. R. 30) prescribed the following form for alleging the right and the breach: "That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill."

⁶ 1 Saund. 220, note (1) to Stennel v. Hogg; Notes to Saund. 260. So on an application for a mandamus the prosecutor complained that the defendants, as trustees of navigation,

sion by the defendant, and the evidence showed a diversion, but that he provided means for returning the water to the stream above the plaintiff's lands, and that the return was prevented by the act of another person, it was held that the allegations were sufficient, and that there was no material variance.¹ But under a declaration for obstructing the natural flow of a stream, "which had theretofore run and flowed," "and of right ought to run and flow freely," no recovery can be had for injuries caused by the improper construction of an authorized dam.²

§ 484. The plaintiff is not bound to prove as great an injury as that alleged, but only to prove an injury of the kind charged, sufficient to constitute a cause of action.³ In an action for flowing the plaintiff's land, where it was alleged that the defendant unlawfully erected and kept up a certain dam, and the proof offered was that he kept the gates or sluices in the dam shut when he should have kept them open, and thereby caused the injury complained of, it was held that there was no variance. Redfield, J., in delivering the opinion, said: "He must prove the very injury of which he complains, but not to the full extent. If he alleges the dam to be ten feet high, or unlawfully erected, or wholly unlawful, he may recover upon showing it five feet high, or unlawfully continued or repaired, and made tighter or higher, so that in fact it is but partly unlawful. If any portion of the dam is unlawfully erected or kept up, and it cause an injury to the plaintiff of the kind he complains of,

had charge of a lock, weir, and clows in a stream near his land, that the water was increased by rains, and the clows were not sufficiently raised to let off the water, whereby he suffered damage, but did not allege that the effect of the works was to raise the water higher than it would have been if they had not existed. The issue on the return and pleadings was whether the damage was caused by

the navigation and works. It was held that, although the allegations might have been insufficient on demurrer, the defect was cured by the verdict. *Delamere v. The Queen*, L. R. 2 H. L. 419.

¹ *Stein v. Burden*, 29 Ala. 127.

² *Wood v. Rice*, 24 Mich. 523.

³ In *Luttrell's case*, 4 Co. Rep. 89 a, it was held that the amount of diversion was immaterial.

he may recover."¹ But, as we have already seen, a variance is now easily corrected under the statutes of amendments.²

§ 485. The rule that a tort cannot be proved upon an allegation in an action *ex contractu* applies to actions for injuries to rights in waters. Under a complaint against the alienee of the grantor of an easement of taking water from a pond, the plaintiff cannot recover for the defendant's tortious interference with his rights in such water. In New York, this rule has not been changed by the adoption of the code.³

§ 486. It is a general principle that damages should always be alleged in personal actions. But an action will lie for any infringement of the plaintiff's rights although no special damage be caused.⁴ It follows that in such cases no special damage need be alleged.⁵ And it is equally well settled that general damages such as the law implies from the tort complained of need not be alleged.⁶ But if the plaintiff claims any special damages, it is necessary to allege them with sufficient definiteness to inform the defendant of the nature of his claim.⁷ The loss of rents occasioned by a nuisance is a special damage, and cannot be proved unless specially alleged.⁸

§ 487. At common law the plaintiff might set forth his cause of action in several counts, with substantial variations,

¹ *Hutchinson v. Granger*, 13 Vt. 386. So under a count for diverting and preventing water from coming to a mill, leakage and wastage may be shown. *Wier v. Covell*, 29 Conn. 197.

² See *ante*, § 478. In *Morris v. McNamee*, 17 Penn. St. 173, the plaintiff was allowed to amend a declaration for obstruction and diversion by the addition of a clause alleging that the defendant, during the same time, unlawfully discharged the water of the stream, so that it came upon the premises of the plaintiff at unreasonable times and in unreasonable quantities; and this amendment was held

proper to be made at the trial after a reference to arbitration, award for the defendants, and appeal by the plaintiff.

³ *Beard v. Yates*, 2 Hun, 466.

⁴ *Ante*, § 401.

⁵ 1 Chitty Pl. 411. See *Pastorius v. Fisher*, 1 Rawle, 27.

⁶ *Richards v. Hill*, 1 Ld. Raym. 102; *Hutchinson v. Granger*, 13 Vt. 386.

⁷ 1 Chitty Pl. 411; *Solms v. Lias*, 16 Abb. Pr. 311; *Moline Water Power Co. v. Waters*, 10 Brad. (Ill.) 159.

⁸ *Parker v. Lowell*, 11 Gray, 358; *Plimpton v. Gardiner*, 64 Maine, 360; *Potter v. Froment*, 47 Cal. 165.

so that if he failed on one, he might succeed on another. The right to declare in several counts has been modified and limited in almost all jurisdictions where the common law prevailed, and in many abolished. The law upon this subject is stated at length in the books on procedure; but a discussion of it here would be foreign to our purpose.¹

§ 488. In actions on the case for nuisances, as in other actions on the case, the general issue of "not guilty" was at common law a simple denial that the plaintiff was entitled to judgment, and under it anything might be given in evidence which tended to defeat the plaintiff's claim.² This was an extension of the scope of the plea which on principle should have been confined to a traverse or denial of the *facts* alleged in the declaration.³ But under this rule the plaintiff was at liberty to introduce evidence denying the plaintiff's title, or of a license, or accord and satisfaction, or a former recovery, or any defensive matter. And in jurisdictions retaining the common-law rules in their completeness, this is still the law.⁴ So where the defendant pleaded to a declaration for diversion, that the stream sprung from his ground, and that he had a prescriptive right to fill certain pits therefrom, which becoming filled up, he had dug others instead, which he had filled from the stream, and denied diverting any water,

¹ See 1 Chitty Pl. (16th ed.), 424. Woolrych (p. 398) says: "Other counts varying the matters charged against the defendant are commonly introduced. For example, there may be one alleging a general diversion of the water without showing the means; another for widening cuts from the stream, etc.; and a count for not keeping the banks of the river in repair is said to be proper in order to avoid a risk, namely, of not being able to show that the defendant made the cuts or channels stated in the first count. The above may suffice as an example of the declarations on this subject, but there are many others in

which the causes of complaint and the resulting injuries may be infinitely diversified."

² 1 Chitty Pl. (2d Am. ed.), 486; (12th Am. ed.), 491; 1 Tidd Pr. (3d Am. ed.), 651; 3 Dane Abr. 56.

³ Stephen, Pl. 177. And see Metcalf's note, Yelv. 147 b, n. 1. Lord Mansfield assigns as a reason for this extension, that the action on the case is "in the nature of a bill in equity," "because the plaintiff must recover upon the justice and conscience of his case." *Bird v. Randall*, 3 Bur. 1353. And this is repeated in the books.

⁴ *Plowman v. Foster*, 6 Coldw. 52; *Puterbaugh's Practice* (Ill.), 1880, 489.

except in this way, the plea was held bad, as amounting to the general issue.¹

§ 489. In New York it is held that a general denial, pleaded in an action for the wrongful diversion of water, does not draw in question the title to the premises.² But in an action of trespass, on appeal from a justice's court, for removing gates

¹ *Brown v. Best*, 1 Wils. 174. In England the new rules of pleading provided: "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact, alleged in the declaration. *E.g.*, in an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way." Hilary Term, 4 Will. 4, 1834; 5 B. & Ad. i. In the rules of Hilary Term, 1853, rule 16, on the same point, was substantially the same as this. See 17 Jur. Part II., pp. 168, 170. Where the plaintiff alleged that he was possessed of a water-mill, and by reason thereof ought to have had a stream of water running to his mill, yet that the defendant wrongfully diverted "the said stream," it was held that, under these rules, the word *wrongfully* did not put the title in issue. *Frankum v. Falmouth*, 2 A. &

E. 452. To same effect see *Blood v. Keller*, 11 Ir. C. L. (1860) 132. In *Dukes v. Gostling*, 1 Bing. N. C. 588; 1 Scott, 570; 3 Dowl. 619, in an action for diverting water from the plaintiff's pond, it was held that the plea of not guilty put in issue the fact of diversion only, and admitted the matters alleged by way of inducement. But under these rules "not guilty" put in issue both the act complained of and its consequences. So, in an action for erecting a cesspool near a well, and thereby contaminating the water of the well, the plea of not guilty was held to put in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated. *Norton v. Scholesfield*, per Parke, B. 9 M. & W. 665; s. c. 1 Dowl. N. S. 638. Where a local company was authorized to enter on lands and sink wells to obtain a supply of water for a town, not depriving the occupiers of the lands of water for their own necessary uses, and such company complained against an occupier for diversion, the court (per Parke, B.) held that under the plea of not guilty, and a plea denying the plaintiff's right, the defendant might make the defence that within twenty years after the discovery of the spring by the plaintiffs, he had sunk a well, and used the water in a manner and for purposes not prohibited by the act. *South Shields Water Works Co. v. Cookson*, 15 L. J. Ex. 315.

² *Rathbone v. McConnell*, 21 N. Y. 466.

from a raceway, it was held that the defendant might show under a general denial, that the raceway ran through his land, which could be rebutted only by proof of an easement, and that this would involve title, which would oust the justice's jurisdiction.¹ Where trespass is brought for flowage, if the defendant relies on a license, it must be pleaded specially, and cannot be proved under the general issue; but it is sufficiently pleaded, if the facts constituting the license are averred.² A plea of license to divert does not draw in question the title to the premises.³

§ 490. In trespass a prescriptive right to a watercourse, or in respect of any use of waters, must be pleaded specially;⁴ and at common law it was necessary to show who was seized in fee of the land in respect of which it was claimed, and then to aver that immemorially all the ancestors of the party so seized were entitled to, and from time to time actually exercised the right; and the title was required to be pleaded with exactness.⁵

§ 491. A prescription cannot be pleaded against a prescription without a traverse of the plaintiff's right. This was decided in an action for the diversion of a watercourse in which the plaintiff claimed a prescriptive right to the flow of the water, and the defendant set up a prescription to maintain a ditch on his land.⁶ A plea of prescriptive right in

¹ O'Donnell v. Brown, 3 Lans. 474.

In another case, appealed from a justice's court, it was held that the question where a stream ought to run (in trespass for entry to abate a nuisance and restore a diverted stream to its channel) did not involve title. Bowyer v. Schofield, 1 Abbott, N. Y. Ct. of Ap. 177; s. c. 2 Keyes, 628. But the question whether one party has a prescriptive right to use a well on the premises of another involves title. Gage v. Hill, 43 Barb. 43.

² Lockhart v. Geir, 54 Wis. 133.

³ Rathbone v. McConnell, 21 N. Y. 466.

⁴ 1 Chitty Pl. (16th ed.), 541.

⁵ Ibid. And see Gale on Easements (5th ed.), 677; 1 Wms. Saund. 346*n*; 1 Notes to Saund. 624. By the Prescription Act, 2 & 3 Wm. 4, c. 71, it was provided that it shall be sufficient to allege the enjoyment of such rights as of right, by the occupiers of the tenement in respect of which it is claimed, for the required periods, without setting out the title of the fee.

⁶ Murgatroyd v. Law, Carthew, 116. The Hilary Rules (4 Will. 4, 1834) provided that in all actions in which a right of way or other similar right

respect of a mill, to use the water of a canal for generating steam and supplying a cistern, was held divisible where the evidence supported the right for the former purpose, but not for the latter.¹ Where the defendant in one plea claimed the right to have water flow from a mill-stream to a ditch at all times, and in another plea claimed the right only at times when the stream was increased by certain water called "flash water," and the jury found the right in his favor at all times, the finding was held to include the right claimed by the other plea, and the jury was discharged as to it.² Where the defendant relies on an easement, the plaintiff may defeat it by showing that the defendant held the estates by unity of possession without a special replication to that effect.³

is so pleaded, if the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. This was held to apply to the case of a claim of right to pass and repass for the purpose of carrying water and goods, where the jury affirmed the right so far as it related to the carrying of water, but negated it as to the rest. *Knight v. Moore*, 3 Scott, 326; 3 Bing. N. C. 3.

¹ *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287.

² *Drewett v. Sheard*, 7 C. & P. 465.

³ *Clay v. Thackrah*, 9 C. & P. 47, where easement of way was claimed. Only *v. Gardiner*, 4 M. & W. 496. For a form of pleas denying the plaintiff's right to the water, see *Thomas v. Thomas*, 2 Cr. M. & R. 37. For form of plea of immemorial right at common law to discharge water from a tan-yard into a stream, see *Moore v. Webb*, 1 C. B. N. s. 673. Of a prescriptive right to throw refuse and cinders into a stream; *Murgatroyd v. Robinson*, 7 El. & B. 391; *Carlyon v. Lovering*, 1 H. & N. 784; s. c. 26 L. J. Ex. 251. Under the Prescription Act (2 & 3 Will. 4, c. 71) of prescriptive right to lower a weir for the purpose of irrigation; *Ward v. Robins*,

15 M. & W. 237. Of a prescriptive right to discharge noxious water into a stream; *Wright v. Williams*, 1 M. & W. 77. Of a prescriptive right to scour and amend the channel of a watercourse; *Peter v. Daniel*, 5 D. & L. 501. In justification of a trespass, because the defendants had, as occupiers of a mill, an easement of going upon the close to repair the banks of a stream which flowed to the mill; *Clay v. Thackrah*, 9 C. & P. 47. In justification of the obstruction of a watercourse, because the plaintiff thereby wrongfully discharged water upon the defendant's land; *Roberts v. Rose*, L. R. 1 Ex. 82. For other forms of pleas, see 2 Chitty Pl. (16th ed.), 733. By the Supreme Court of Judicature Act of 1873, 36 & 37 Vict. c. 66, Schedule "Rules of Procedure," R. 1 (L. R. 8 Gen. Sts. 350), one form of action is substituted for the different forms employed at common law. In the Judicature Act of 1875, 38 & 39 Vict. c. 77, First Schedule, Order XIX., s. 20 (L. R. 10 Gen. Sts. 797), it is provided: "It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a de-

§ 492. In order to recover, the plaintiff must prove his right and the injury caused by the defendant. His right may be in possession or reversion, or it may be an incorporeal right; but he must prove the right which he has alleged, and in respect of which he has brought suit. The subject of variance has been already considered under the subject of pleading.¹ As the defendant may defeat the action by proving a right in himself, the same rules will apply to evidence of right in either party.

§ 493. Evidence of a similar injury to other persons or tracts of land is within the rule excluding *res inter alios acta*, unless it is shown that all the conditions of the two events are the same. So where the injury was caused by removing stones from a river, in consequence of which the river washed away the plaintiff's land, evidence that the removal of stones at another place on the river had produced the same effect was excluded.²

§ 494. Damage need not be shown where the injury is to a private right,³ but must be for injuries to an individual by a public nuisance;⁴ and we have considered the time to which damages should be computed.⁵ Evidence of special damage

fence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth."

¹ See *ante*, § 478. The plaintiff has a right to support his cause by proof of the facts stated in his declaration, whether they are sufficient in law to entitle him to recover or not; and this can only be prevented by a demurrer. So the plaintiffs should be allowed to prove a corruption of a stream as alleged, although it may be shown by the defendants to be no ground for making them liable, if the issue has not been framed so as to render such proof unnecessary. *Howell v. McCoy*, 3 Rawle, 256.

² *Hawks v. Charlmont*, 110 Mass. 110. For applications of the rule to payments for the flowage of other lands,

see *Tyler v. Mather*, 9 Gray, 177; *Ellis v. Harris*, 32 Gratt. 684. Where the plaintiff claimed the whole of the bed of a river running between his land and that of the defendant, the plaintiff was allowed to give evidence of acts of ownership by him lower down the stream, where the river flowed between his land and that of a third person which adjoined the defendant's land; and of repairs done to a fence along the river bank, dividing the third person's land from the river, which was in continuation of a fence dividing the defendant's land from the river. *Jones v. Williams*, 2 M. & W. 326.

³ *Ante*, § 401.

⁴ *Ante*, § 122.

⁵ *Ante*, § 411.

is admissible only when such damage is alleged.¹ Damages must be connected with the injury complained of. In an action for damages by the erection of an embankment cutting off the plaintiff's land from the river, it was held that the plaintiff might show the prevention of deposit of enriching sediment by the entire embankment, and not simply by that portion in front of his land.²

§ 495. The rule excluding evidence of opinion is applied to matters of damage. So, opinions of witnesses as to the amount of damages caused by the deprivation or withdrawal of water from a tavern are inadmissible.³ In an action for flowage, the opinion of a witness as to the amount of damage sustained was held inadmissible.⁴ And in Ohio, it was held that a person who was present during the trial of a cause, and heard witnesses describe the manner in which a ford was injured by the erection of a dam across the stream below the ford, could not be allowed to give his opinion of the damages sustained by the plaintiff.⁵ If the finding of damages by the jury is excessive, it is ground for allowing a new trial.⁶ But if the jury merely compute the damages for too long a time, and the excess is ascertainable, the plaintiff may have judgment by remitting the excess.⁷ A verdict will not be set aside as against the weight of evidence, where the witnesses on one side satisfactorily prove that a dam has not been raised, and those on the other prove that the water in it is higher when the raising of the water, as found by the verdict, can be accounted for by other alterations in the dam.⁸

¹ *Ellicott v. Lamborne*, 2 Md. 131; *McTavish v. Carroll*, 13 Md. 429; *Solms v. Lias*, 16 Abb. Pr. 311.

² *Concord Railroad Co. v. Greely*, 23 N. H. 237. So where the defendant has cut away the portion of the plaintiff's land abutting upon a lake, and made it liable to be washed away, the plaintiff may recover the cost of a retaining wall. *Thompson v. Milwaukee Railway Co.*, 27 Wis. 93; *Price v. Milwaukee Railway Co.*, 27 Wis. 93.

³ *Harger v. Edmonds*, 4 Barb. 256.

⁴ *Sinclair v. Roush*, 14 Ind. 450.

⁵ *Shepherd v. Willis*, 19 Ohio, 142.

⁶ A finding of £3,000 for the diversion of a stream was held excessive by the court of King's Bench on certain facts, and a new trial ordered. *Pleydell v. Dorchester*, 7 T. R. 529.

⁷ So ruled in a flowage case. *Hodges v. Hodges*, 5 Met. 205.

⁸ *Morris Canal and Banking Co. v. Seward*, 3 Zab. 219.

§ 496. The evidence for the defendant may of course be either in rebuttal of the plaintiff's case, or in support of his own. If he relies on a license, it may be proved by parol.¹ A parol license to erect a mill-dam, by which the lands above will be covered with water when executed, has been held binding on all subsequent purchasers of the lands affected.²

§ 497. Under a denial of the injurious consequences of the act complained of, the defendant may show that the volume of the stream has not been diminished or its quality changed.³ So where water was diverted to a reservoir and mixed with other water obtained from the earth, and the whole after being used for a steam-engine was returned to the river, Baron Alderson said: "I left it to the jury to say whether the same quantity of water continued to run in the river, as if none of its water had entered the premises of the

¹ Addison v. Hack, 2 Gill, 221.

² McKellip v. McIlhenny, 4 Watts, 317. In *Liggins v. Inge*, 7 Bing. 682, where the plaintiff's father, by oral license, permitted the defendants to lower the bank of a river and make a weir above the plaintiff's mill, whereby less water flowed to the plaintiff's mill than before, which proving injurious, the father had, after a lapse of five years, requested them to restore the banks to the former level, it was held that no action could be maintained against the defendants for continuing the weir. Tindal, C. J., said: "This is not a license to do acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; which license, if countermanded, the party is but in the same situation as he was before it was granted; but this is a license to construct a work which is attended with expense to the party using the license; so that after the same is countermanded, the party to whom it is granted may sustain a heavy loss. It is a license to do something that, in its own nature, seems intended to be permanent and continu-

ing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a license after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Indeed, the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect." In *Fitch v. Seymour*, 9 Met. 462, the action was by a purchaser whose land was flowed under an oral agreement and license from the plaintiff's grantor. It was brought for a breach of a covenant against incumbrances by such flowage. The court held that the agreement could not bind the estate as to future damages, not being in writing, and that the flowage was therefore no breach of the covenant, and the party flowing the land was liable for such damages to the present owner. The Mill Act there gave annual damages for flowage, recoverable by successive actions.

³ *Embrey v. Owen*, 6 Exch. 353.

defendant; telling them, that if they were of that opinion, they should find a verdict for the defendant.”¹ But the defendant cannot show in mitigation of damages that the act complained of, amounting to an invasion of the plaintiff’s right, was a benefit to the plaintiff, and not an injury; for the plaintiff is not bound to accept a benefit given against his will. He is entitled to any benefits which the defendant’s proper use of the stream may incidentally confer upon him,² and is not bound to exchange one right for another.³ Where prospective damages are allowed, the defendant may show in mitigation that structures erected, or causes set in operation since the suit began, will prevent future injury. So it may be shown that a causeway erected since the suit began will prevent the continuance of flowage.⁴

§ 498. Admissions by a party or declarations by a person interested on either side, must, in order to be admissible as declarations against interest, have been made since his interest accrued.⁵

§ 499. Evidence as to the nature of the injury must, as

¹ *Dakin v. Cornish*, stated by Alderson, B., in *Embrey v. Owen*, 6 Exch. 360. So in *Elliot v. Fitchburg Railroad Co.*, 10 Cush. 191 (a case for diversion), the defendants offered evidence tending to prove that one Clark, under whom they claimed had cut ditches through his meadow, which was wet and spongy, to the brook, thereby increasing the flow of water to the brook; and it was further proved that there was no outlet for the water of the meadow, except into the brook below the dam complained of. Metcalf, J., instructed the jury that if, by these ditches, the flow of water was increased equal to the quantity taken out by the defendants, then the defendants were not liable on appeal. Shaw, C. J., said: “The question was not if the defendants had caused a damage to the plaintiff, amounting in law to a disturbance of

his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether the improvements of Clark upon his meadow, taken together as a whole, including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this, we think, was correctly so left.”

² *Tourtellot v. Phelps*, 4 Gray, 370, 374.

³ *Webb v. Portland Manuf. Co.*, 3 Sumner, 189, 202; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478, 484, 5; *Tillotson v. Smith*, 32 N. H. 90, 96. But see *Addison v. Hack*, 2 Gill, 221, where it is said that the defendant may show a diversion to be a benefit.

⁴ *Tyler v. Mather*, 9 Gray, 177.

⁵ *Tyler v. Mather*, 9 Gray, 177.

we have seen, correspond with the allegation. In proving an injury by the flowage of land, where the defendant claimed the right to flow the land to a certain height, the plaintiff was permitted to introduce the declaration of a former owner that a certain stone marked the height of the defendant's right to flow.¹ In order to charge the defendant for an injury done, it is sufficient to show that it was done by his authority, or that he continues it.² In an action by a canal company for a nuisance in digging clay pits, by which the banks of the canal were injured, it was held incumbent on the plaintiffs to show that the banks were at the time of the damage in such a state as the Act of Parliament required.³ In trespass for entering a close covered with water, and taking fish therefrom, it is held that the ownership of the soil is *prima facie* evidence of ownership of the fish.⁴

§ 500. Where a prescriptive right is alleged, it must be proved by evidence of the exercise of such a right for the statutory period, which in the United States is usually twenty years.⁵ Evidence is admissible of a user for more than the required time,⁶ and also of a user for less than such time, and even of an interrupted use.⁷

§ 501. The claim of a prescriptive right may be defeated by showing it to be under a grant from a temporary occupant, as from the vicar of a parish, who has no power to bind his successor;⁸ or the user may be shown to be permis-

¹ *Tyler v. Mather*, 9 Gray, 177. See on amendments, *ante*, § 478.

² *Penruddock's case*, 5 Co. 100. And see *Greenl. Evid.*, § 472.

³ *Stafford Canal Co. v. Hallen*, 6 B. & C. 317. But see *Rex v. Trafford*, 1 B. & Ad. 874; 3 *Starkie Evid.* (7th Am. ed.), 1252.

⁴ *Waters v. Lilley*, 4 Pick. 145.

⁵ *Ante*, § 329. For the Prescription Act in England, see 2 & 3 Will. 4, c. 71.

⁶ *Lawson v. Langley*, 4 A. & E. 890 (a case of way).

⁷ *Bealey v. Shaw*, 6 East, 208, 215; *Gilman v. Tilton*, 5 N. H. 231. Lord Ellenborough, C. J., said: "I take it that twenty years exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right."

⁸ *Wall v. Nixon*, 3 Smith, 316.

sive, and evidence may be given of what a former tenant said as to asking permission to have the water, which may be a verbal act, and may be proof or disproof of an exercise of right by one, and an acquiescence in it by the other.¹

§ 502. When a prescriptive right is made out, and the opposing party seeks to show a limitation of the right, he has the burden of proof,² but may establish the limitation by the same kind of evidence, as of user, as that by which the right itself may be proved.³ But where a proprietor on one shore appropriates so much of the passing water as he is enabled to control, even the whole of it, by means of structures on his own estate, he can thereby gain no prescriptive right to appropriate more than one-half the same, so long as the opposite proprietor neither uses nor seeks to use any part of the stream to which he is entitled.⁴

§ 503. To avoid the effect of a grant, the party claiming the prescriptive right may give evidence tending to refer the grant to a different right, subject of course to the rules of evidence on explanation of documents.⁵ An alleged easement may be defeated by showing that the party claiming it held both the dominant and servient estates by a unity of possession. So where an easement was claimed by the holder of a mill, of entering upon lands in order to repair the banks of a stream, letters which the claimant had written, while lessee of the mill, were held admissible to show the nature of his possession.⁶

§ 504. A former judgment on the question of right involved will, if pleaded, be conclusive of the rights of the parties or those claiming through or under them.⁷ This was the rule originally, and it was held with great strictness that

¹ *Wakeman v. West*, 8 C. & P. 105; *ante*, c. 11.

⁶ *Clay v. Thackrah*, 9 C. & P. 47.

² *Bliss v. Rice*, 17 Pick. 23, 33, 34.

⁷ *Vooght v. Winch*, 2 B. & Ald. 662;

³ *Burnham v. Kempton*, 44 N. H. 78.

Evelyn v. Haynes, *per* Ld. Mansfield, C. J., cited *per* Lord Ellenborough, in

⁴ *Pratt v. Lamson*, 2 Allen, 275, 288.

Outram v. Morewood, 3 East, 365.

⁵ *Tyler v. Mather*, 9 Gray, 177.

if the party claiming the benefit of the judgment did not plead it, but simply offered it in evidence, he thereby, in the language of Abbot, C. J., "consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence submitted to them."¹ So it was held that a judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive.² Where the party is not allowed or required to plead specially, the judgment is allowed its full force in estoppel, when given in evidence;³ and it is now held by several authorities that it will be equally conclusive in all cases, whether pleaded or given in evidence.⁴

¹ Vooght v. Winch, 2 B. & Ald. 662, criticising Lord Mansfield's opinion in Bird v. Randall, 3 Burr. 1353, that in an action on the case a judgment given in evidence is conclusive.

² Miles v. Rose, 5 Taunt. 705. In case for diversion, it was held that where a question of right has been tried in an action on the case, the record of that trial is evidence in a second action against the same defendant, though there are other defendants, if they all claim under him. Strutt v. Bovingdon, 5 Esp. 56. To the same effect, see Blakemore v. Glamorganshire Canal Co., 1 Gale, 78.

³ Kilheffer v. Herr, 17 S. & R. 319. See Clink v. Thurston, 47 Cal. 21; Gans v. St. Paul Ins. Co., 43 Wis. 108.

⁴ In 1 Greenl. Evid. § 531, it is said: "Notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by the way of estoppel." And in the notes, Marsh v. Pier, 4 Watts, 288, is relied on, and Kilheffer v. Herr (opinion of

Huston, J.) is cited in support. For a further discussion of the question supporting the wider rule, see Bigelow on Estoppel (3d. ed.), 583. And for a discussion of Vooght v. Winch, 2 B. & Ald. 662, upholding it, as deciding that the conclusiveness of the estoppel is waived by not pleading it, see 2 Sm. Lead. Cas., notes to Doe v. Oliver, and Duchess of Kingston's Case (7th ed. 628-9). The reason for the rule in Vooght v. Winch is that the form of the pleadings opens the case for evidence on the merits, and if the case is before the jury on the merits, the question of estoppel is out of the case. The distinction that where, from the nature of the pleadings, recovery cannot be specially pleaded, it shall still be an estoppel, is a clear exception to the general rule. That the law in New York is as stated in the text, see Wood v. Jackson, 8 Wend. 9; Krekeler v. Ritter, 62 N. Y. 372. And that the law was the same in Massachusetts until altered by statute, see Howard v. Mitchell, 14 Mass. 241; Adams v. Barnes, 17 Mass. 365; Bartholomew v. Candee, 14 Pick. 167; Sprague v. Waite, 19 Pick. 455. In Pennsylvania, the common-law rule seems to be in force where there is an

§ 505. If the plaintiff recovers judgment for the erection of a nuisance, and brings a second action for its continuance, he should recite the judgment in his declaration, and state that the action is for a continuance of the same, or the rule applies to both parties that the judgment is only evidence unless averred in pleading. In an action in Pennsylvania for the continuance of a dam overflowing the plaintiff's land, where the plaintiff so averred the former recovery, the court said: "In an issue on a declaration or plea founded on a former judgment, the only proper subject to be submitted to the jury is whether or not the matter in dispute in the present action is the same that was litigated in the former one. With this fact found the court must decide upon the effect of the former judgment."¹ In an action for the con-

opportunity to plead the judgment. In an action on the case for the continuance of a nuisance by maintaining a dam, the defendant pleaded not guilty, license, and the statute of limitations, and offered in evidence the record of a former trial between the same parties on the same pleas, and the court held that the judgment would not be conclusive unless pleaded. *Kilheffer v. Herr*, 17 S. & R. 319. This seems to be the decision in that case. It is so stated in the head-note, and so treated in subsequent cases. *Marsh v. Pier*, 4 Rawle, 273; *Kerr v. Chess*, 7 Watts, 367; *Man v. Drexel*, 2 Penn. St. 202. It is cited as an authority for the rule that the judgment is equally conclusive, though not pleaded, in *Walton v. Dickerson*, 7 Penn. St. 376. But the court said (*per Rogers, J.*): "These principles apply only where special pleading is required, for I grant that where the parties are not bound to plead or reply specially, the record of a former recovery is conclusive evidence, binding the plaintiff, the court, and the jury, as in actions of *assumpsit* and *debt*." (Relying on the *Duchess of Kingston's Case*, 20 How. St. Tr. 537.) But, as we have seen, at common law

the greatest latitude was extended to defences in the action on the case, offered under the plea of not guilty; and it would seem that if there were to be any exceptions to the rule, the action on the case would be one; and so it was held in Pennsylvania in *Gilchrist v. Bale*, 8 Watts, 355, 358. So that the authority of *Kilheffer v. Herr*, for the point in the text, is by no means unquestioned. In *Long v. Long*, 5 Watts, 102, the action was on the case for obstructing a stream, and a former judgment was specially pleaded. *Rogers, J.* (who gave the opinion in *Kilheffer v. Herr*), in his opinion followed the doctrine stated in the text, and cited the former case as in accord. In *Smith v. Elliot*, 9 Penn. St. 345, the action was on the case for diverting water from the plaintiff's mill. The defendant pleaded the general issue, and insisted that a former judgment, offered in evidence, was conclusive. *Rogers, J.*, again delivered the opinion. He followed *Vooght v. Winch* (2 B. & Ald. 662, see *supra*), and held that the judgment, while admissible, was not conclusive, and again construed *Kilheffer v. Herr* as in accord.

¹ *Rockwell v. Langley*, 19 Penn. St.

tinuance of a nuisance; by maintaining a dam which overflowed the plaintiff's mill and spring, where the defendants relied on a former recovery, it was held that the plaintiff might give evidence that at the former trial he gave no evidence of the damage done during a part of the time laid in the declaration, and that the defendant might contradict it by other evidence.¹

502. In *Heller v. Pine*, 8 Blackf. 175, the Supreme Court of Indiana held the same way. The action was case for obstructing a watercourse to the injury of the plaintiff's mill. The defendant pleaded the general issue. The *plaintiff* offered in evidence the record of a former cause for an injury to the same mill, by the same obstruction, and asked the court to

instruct the jury that it was conclusive as to all matters put in issue at the former trial. But it was held that the record, though strong evidence for the plaintiff, could not act as an estoppel.

¹ *Haak v. Breidenbach*, 6 Binney, 12; 3 S. & R. 204. The doctrine of *res adjudicata* was not considered in this case.

CHAPTER XIII.

EQUITABLE REMEDIES.

SECTION.

- 506, 507. By injunction. — Without first establishing a clear right at law.
- 508-511. Ibid. — Irreparable injury.
- 512-517. Ibid. — Present and prospective injury.
- 518-520. Ibid. — Claim of adverse right by defendant.
- 521-523. Ibid. — Allegations in the bill.
- 524-527. Preliminary injunction. — When granted.
- 528, 529. Perpetual injunction. — When granted.
- 530-533. Ibid. — Acquiescence and equitable estoppel.
- 534-537. Injunctions in cases of obstruction or diversion of streams and other waters.
- 538, 539. Ibid. — Where the parties' rights are fixed by contract or otherwise.
540. Regulation of common rights in equity.
541. Injunctions in cases of nuisances from stagnant water.
542. Not granted to protect subterranean percolations.
543. May issue to protect prior appropriations of water in mining districts.
- 544-546. Injunctions. — To restrain pollutions.
547. Ibid. — To prevent impediments to navigation and private rights of access.
- 548, 549. Ibid. — In other instances of injuries affecting waters.
- 550, 551. Practice as to granting injunctions.
- 552-554. Form of injunction.
- 555-557. Command to abate.
- 558-561. Difficulty in framing or fulfilling the order, no ground for refusing relief.
- 562-568. Bills of peace.
- 569-578. Specific performance.

§ 506. Nuisances and injuries affecting waters are remedied in equity by the writ of injunction. The ground upon which equity takes jurisdiction is that the injury complained of is irreparable or of such a nature that there is no adequate remedy at law. It is an extraordinary remedy, and granted only where the plaintiff's right and his danger of suffering such an injury are clear. It is not, however, indispensable that the plaintiff should establish his title at law before coming into equity;¹ for, if the plaintiff's right had never been drawn in question, he would be put to delay in establishing it at law, and meanwhile the injury threatened might become complete, and the purpose for which equity takes jurisdiction defeated.

§ 507. In *Bush v. Western*,² the plaintiff had been for sixty years in possession of the watercourse which was diverted, and it was held proper in such a case to bring the suit in equity in the first instance; and in *Gardner v. Newburgh*,³ Chancellor Kent held that where the plaintiff showed that he had immemorially enjoyed the right to use the stream, there was no need of a trial at law. In *Holsman v. Boiling Spring Co.*,⁴ it is said: "Where the complainant seeks protection in the enjoyment of a natural watercourse

¹ *Bush v. Western*, Prec. in Ch. 530; *Finch v. Resbridger*, 2 Vern. 390; *Ripon v. Hobart*, 3 Myl. & K. 169; *Dewhirst v. Wrigley*, 1 Cooper Prac. Cas. 319; *Branfort v. Morris*, 6 Hare, 340; *Goodson v. Richardson*, L. R. 9 Ch. Ap. 221. See St. 2526 Vict. c. 42, § 4. *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Seneca Woollen Mills v. Tillman*, 2 Barb. Ch. 9; *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.) 335; *Reid v. Gifford*, Hopk. Ch. (N. Y.) 416; *Mohawk Bridge Co. v. Utica & Schenectady Railroad Co.*, 6 Paige, 554; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Denton v. Leddell*, 23 N. J. Eq. 64; *Sprague v. Rhodes*, 4 R. I. 301; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *Burden v. Stein*, 27 Ala. 104; *Corning v. Troy Iron Factory*, 40 N. Y.

191; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Lyon v. Ross*, 1 Bibb (Ky.) 466. Originally the rule undoubtedly was that the plaintiff must, in every case, first establish his right at law. In *Weller v. Smeaton*, 1 Bro. C. C. 572 (1784), Lord Thurlow said that in no instance, except that of *Bush v. Steinman* (1720), had equity ever interposed on a mere question of right between A. and B. See also *Welby v. Rutland*, 2 Bro. P. C. (Tomlin's ed.), 39.

² *Bush v. Western*, Prec. in Ch. 530.

³ *Gardner v. Newburgh*, 2 Johns. Ch. 162.

⁴ *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.) 335, 343.

upon his land, the right will ordinarily be regarded as clear; and the mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction." But where the rights of the parties are in dispute, and have never been adjudicated, equity will not undertake to try the right on a bill for injunction, but will direct an issue and require the plaintiff first to establish his title at law.¹ If it is not clear that the acts of a corporation in obstructing a stream are unauthorized by its charter, that question must be determined against it by an action at law, before it will be restrained by injunction.² But even in such case, if an act is threatened which would be an irreparable injury to the rights in question, if established, the court will interfere by an interlocutory injunction, and preserve the property and rights of the parties *in statu quo* until the question of right is determined.³

§ 508. By irreparable injury, which is the equity of the bill, is meant one for which there is no adequate remedy at law.⁴ In *Wood v. Sutcliffe*, which was a case for injunction

¹ *Agar v. Regent's Canal Co.* (per Lord Eldon), Cooper, Chan. Cas. 77; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Mayor of Cardiff v. Cardiff Water Works*, 4 De Gex & J. 596; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Seneca Woollen Mills v. Tillman*, 2 Barb. Ch. 9; *Porter v. Witham*, 17 Maine, 292; *Cummings v. Barrett*, 10 Cush. 186; *Prentiss v. Larnard*, 11 Vt. 135; *White v. Forbes*, Walk. (Mich.) 112; *Heiskell v. Gross*, 7 Phila. 317; *Bliss v. Kennedy*, 43 Ill. 67; *Stolp v. Hoyt*, 44 Ill. 219; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *Parker v. Winnipiseogee Lake Co.*, 2 Black, 545.

² *Sheboygan v. Sheboygan Railroad Co.*, 21 Wis. 667.

³ *Ripon v. Hobart*, 3 Myl. & K. 169, 181, 182; *Beaufort v. Morris*, 6 Hare, 340; *Whitchurch v. Hide*, 2 Atk. 391; *Buller v. Society*, 12 N. J. Eq. 264; *Mor-*

ris Canal Co. v. Central Railroad Co., 16 N. J. Eq. 419, 425; *Troy v. Norment*, 2 Jones Eq. (N. C.) 318; *Richmond v. Dubuque Railroad Co.*, 33 Iowa, 482; *United States v. Duluth*, 1 Dillon, 469; *Ingraham v. Dunnell*, 5 Met. 118; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Sprague v. Rhodes*, 4 R. I. 301, 309; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Phillips v. Stocket*, 1 T. R. 200; *Binney's Case*, 2 Bland. Ch. 99; *Bliss v. Kennedy*, 3 Ill. 67. See 1 High on Injunctions (2d ed.), § 8; *Kerr on Injunctions*, (2d ed.), c. 3; *Great Western Railway Co. v. Birmingham Co.*, 2 Phila. 597, 603.

⁴ *Shields v. Arndt*, 3 Green Ch. 234; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Scudder v. Trenton Delaware Falls*, 1 Saxt. (N. J.) 694; *Lamborn v. Covington Co.*, 2 Md. Ch. 409; *Nicodemus v. Nicodemus*, 41 Md. 529; *Coe v. Winnipiseogee Lake Co.*,

against corrupting water, it is stated among other conditions that, "if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not *in specie*, place them in the position in which they previously stood," equity will interfere.¹

§ 509. The court is not governed by questions of pecuniary value, but will remedy and prevent an injury which it may be reasonably supposed would materially lessen the enjoyment of property by its owner.² Where the damage is inconsiderable, or accurately ascertainable, and capable of adequate compensation at law, equity will not interfere.³

§ 510. A mere trespass and entry, as for the enlargement of a course for the discharge of water, is not such an injury.⁴ The pollution of a stream causing serious and continuous, or frequently recurring obstruction of the plaintiff's use of the water, is ground for injunction.⁵ A diversion depriving the plaintiff of the use of a stream is such an injury, and it is

37 N. H. 254, 264; *Parker v. Winnipiseogee Lake Co.*, 2 Black, 545; *Legg v. Horn*, 45 Conn. 409; *Crown v. Leonard*, 32 Ga. 241; *Wright v. Moore*, 38 Ala. 593; *Laney v. Jasper*, 39 Ill. 46; *Welton v. Martin*, 7 Mo. 307; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Fairhaven Marble Co. v. Adams*, 46 Vt. 496; *Heiskell v. Gross*, 7 Phila. 317; *Mason v. Cotton*, 2 McCrary, 82.

¹ *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

² *White v. Forbes*, Walker (Mich.) 112. In New York, by statute, interference by equity was formerly limited to injuries amounting to \$100, and in case of diversion causing recurring damage to cases where the annual injury equalled the interest on \$100. *Smith v. Adams*, 6 Paige, 435. Under a similar statute in Michigan, it is held that equity will take jurisdiction of suits involving land worth in itself less than \$100, if the riparian right

annexed makes it worth more. *Blodgett v. Dwight*, 38 Mich. 596.

³ *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Attorney General v. Gee*, L. R. 10 Eq. 131; *Lillywhite v. Trimmer*, 36 L. J. Ch. 525; *Wing v. Fairhaven*, 8 Cush. 363; *Shreve v. Voorhees*, 2 Green Ch. 25; *Quackenbush v. Van Riper*, 2 Green Ch. 350; *Van Winkle v. Curtis*, Id. 422; *Stevens v. Ryerson*, 2 Hal. Ch. 477; *Morris Canal Co. v. Central Railroad Co.*, 16 N. J. Eq. 419; *Smith v. Adams*, 6 Paige, 435; *Heiskell v. Gross*, 7 Phila. 317; *Eason v. Perkins*, 2 Dev. Eq. 38; *Wilder v. Strickland*, 2 Jones Eq. 386; *Nicodemus v. Nicodemus*, 41 Md. 529; *Fox v. Holcomb*, 32 Mich. 494; *Stone v. Peckham*, 12 R. I. 27; *Thornton v. Grant*, 10 R. I. 477.

⁴ *Jerome v. Ross*, 7 Johns. Ch. 315; *Nicodemus v. Nicodemus*, 41 Md. 529. See *Crown v. Leonard*, 32 Ga. 241.

⁵ *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

said that a disturbance or deprivation of one's riparian right is in itself an irreparable injury.¹ The erection of a race-way which would involve cutting down a river-bank, destroying trees, and exposing ground to be washed away is a clear case of waste, in which equity will interfere.² But the overflowing of land, causing the destruction of timber, and other damages, has been held not a sufficient injury to justify interference.³ Where the diversion of a stream will cause the stoppage of the plaintiff's mill and throw a number of servants out of employment, the injury is plainly irreparable.⁴ Depriving the plaintiff of his right to a supply of water for his house from a spring, and the cutting and destruction of his pipes laid for conducting the water, are also grounds for interference.⁵

§ 511. If a statute authorizing the taking of property, or flowage of land, or use of a stream, provides an adequate remedy by special proceeding to parties injured thereby, equity will not take jurisdiction.⁶ The mere existence of a legal remedy will not bar equitable jurisdiction where the remedy in equity is more adequate, comprehensive, and effectual.⁷ So, where a Mill Act gave the court power to abate and remove a dam, without having a prospective effect, it was held that equity would take jurisdiction to determine the proper height of the dam, fix terms upon which it could be maintained, and perpetually enjoin the nuisance.⁸ An injunction will not be granted merely as a means of compelling a defendant to make compensation; as if having had the lease of a water-right, he holds over and refuses to pay for the use and occupation.⁹ But where the defendant is insolvent and unable to respond in damages, this is itself a

¹ *Holsman v. Boiling Spring Co.*, 42; *Spangler's Appeal*, 64 Penn. St. 387; *ante*, § 250.

² *Scudder v. Trenton Delaware Falls*, 1 Saxt. (N. J.) 694.

³ *Coe v. Winnipiseogee Lake Co.*, 37 N. H. 254, 264.

⁴ *Wright v. Moore*, 38 Ala. 593.

⁵ *Legg v. Horn*, 45 Conn. 409.

⁶ *Bull v. Valley Falls Co.*, 8 R. I. Ch. 410.

⁷ *Bemis v. Upham*, 13 Pick. 169; *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 16 Pick. 512; *Ballou v. Hopkinton*, 4 Gray, 324.

⁸ *Bemis v. Upham*, 13 Pick. 169.

⁹ *Warne v. Morris Canal Co.*, 1 Hal.

ground upon which equity will take jurisdiction, as a recovery at law would necessarily be an inadequate remedy.¹

§ 512. The remedy being preventive, past injuries are not in themselves grounds for equitable interference.² But where some degree of injury is shown, the court will consider its probable continuance;³ and if the injury seems likely to continue, equity will not refuse to interfere because the damage is slight.⁴ The fact that the act complained of is completed will not prevent an injunction from issuing against the continuance of a trespass or nuisance.⁵ An uncertain future

¹ *Winnipiseogee Lake Co. v. Wors-ter*, 29 N. H. 433; *Hart v. Mayor of Albany*, 3 Paige, 212; *Atchison v. Peterson*, 20 Wall. 507, 515; *Sword v. Allen*, 25 Kansas, 67; *Derry v. Ross*, 5 Col. 295. In *Heilman v. Union Canal Co.*, 37 Penn. St. 100, which was upon a bill to restrain a canal company from using the water of a certain creek, it is said: "The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the insolvency of the defendants, is not of itself a ground of equitable interference. The remedy is what is to be looked at, if it exist, and is ordinarily adequate; its possible want of success is not a consideration. It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy. Hence, the alleged insolvency of the company, and the supposed inability to collect damages that may be recovered from it, is no reason for interfering by injunction." And this position is adopted by Mr. High (*Injunctions*, 2d ed., § 18). It is called "an important consideration" in 29 N. H., p. 449. In the Pennsylvania case, the defendant had used water belonging to the plaintiff for twenty years with his consent, and had paid him therefor. But in the

leading case on the point, *Smallman v. Onions*, 3 Bro. Ch. 621, Lord Eldon granted an injunction to stay waste against the tenant in common of the plaintiff solely on the ground of insolvency. The law is the same in New Jersey. *West v. Walker*, 2 Green Ch. 279, note B. 291, citing MS. cases of *Read v. Cornelius*, and *Norcross v. Fisher*.

² *Coalter v. Hunter*, 4 Rand. (Va.) 58; *Coe v. Winnipiseogee Lake Co.*, 37 N. H. 254, 266; *Burnham v. Kempton*, 44 N. H. 78, 101; *Society v. Morris Canal Co.*, 1 Saxt. Ch. 157; *Cobb v. Smith*, 16 Wis. 661; *Loker v. Simpson*, 7 Cal. 340; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

³ *Goldsmid v. Tunbridge Wells, L. R.* 1 Ch. 349; *Rochdale Canal Co. v. King*, 2 Sim. n. s. 78; *Attorney General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304; *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Attorney General v. Luton*, 2 Jur. n. s. 180; *Bemis v. Up- ham*, 13 Pick. 169; *Ballou v. Hopkin- ton*, 4 Gray, 324; *ante*, § 346.

⁴ *Ibid.*; *Attorney General v. Shef- field Gas Co.*, 3 De Gex, M. & G. 304.

⁵ *Goodson v. Richardson*, L. R. 9 Ch. 221. In some States the plaintiff is allowed to join an action at law for past damages, with a bill for an injunction. *Akin v. Davis*, 11 Kansas, 580; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Barnes v. Sabron*, 10 Nev. 217; *Columbia Mining Co. v. Holter*, 1 Mont. 296.

injury will not be ground for exerting the extraordinary power of equity.¹ It has sometimes been said that some degree of present injury is necessary before equity will interfere. Thus, in *Elmhirst v. Spencer*, Lord Chancellor Cottonham said: "Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants, as would have entitled him to a verdict at law in an action for damages"; and there are cases in which this is true, viz., where the character of the act as a nuisance is doubtful, and where it is not clear that any damage will follow.²

§ 513. Actual damage, or even a completed violation of the plaintiff's rights, is not necessary to entitle a plaintiff to the protection of equity. In *Webb v. Portland Manuf. Co.*,³ Story, J., said: "But if the doctrine were otherwise, and no action were maintainable at law without proof of actual damage, that would furnish no ground why a court of equity should not interfere and protect such a right from violation and invasion. . . . And one of the most ordinary processes to accomplish this end is by a writ of injunction. . . . If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs." It is settled in England and America that where irreparable injury is threatened, it is not necessary for the plaintiff to wait until some injury has been done before filing his bill, but that equity will take jurisdiction to prevent, if possible, any injury.⁴

¹ *Ripon v. Hobart*, 3 Myl. & K. 169; *Attorney General v. Kingston*, 13 W. R. 888; s. c., 11 Jur. n. s. 596; *Mayor v. Pemberton*, 1 Swanst. 244, 251; *Goldsmid v. Tunbridge*, L. R. 1 Ch. 349; *Rochester v. Erickson*, 46 Barb. 92; *Hough v. Doylestown*, 4 Brewst. 333; *Walton v. Mills*, 86 N. C. 280; *Shreve v. Voorhees*, 2 Green Ch. 25; *Ellison v. Commissioners*, 5 Jones Eq. 57; *Mohawk Bridge Co. v. Utica Railroad Co.*, 6 Paige, 54; *Lytton v. Stewart*, 2 Tenn. Ch. 586; *Society v. Morris Canal Co.*, 30 N. J. Eq. 145, note.

² *Elmhirst v. Spencer*, 2 MacN. & G. 45; *Elwell v. Crowther*, 31 Beav. 163; *Attorney General v. Cambridge Co.*, L. R. 4 Ch. 86; *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; *Lillywhite v. Trimmer*, 36 L. J. Ch. 525; *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; *New Boston Coal Co. v. Pottsville Water Co.*, 54 Penn. St. 164; *Shreve v. Voorhees*, 2 Green Ch. 25.

³ *Webb v. Portland Manuf. Co.*, 3 Sumner, 189, 197.

⁴ *Attorney General v. Forbes*, 2

§ 514. That Lord Cottenham did not intend by the decision in *Elmhirst v. Spencer*¹ to exclude equitable jurisdiction to prevent threatened injuries, may be inferred from his decision in *Attorney General v. Forbes*,² in 1836. In that case the magistrates of the County of Berks threatened to cut the timbers of a bridge over the Thames, being partly in Berkshire and partly in Buckinghamshire. Upon a bill by the attorney general for the inhabitants of the latter county, the threatened injury was enjoined. Lord Cottenham said: "This, at least, is clear, that they (the defendants) have, under a regular order at quarter sessions, given a distinct notice (a notice quite sufficient for the purpose of maintaining an injunction) that they intend to adopt this course, if they have a right to do so. Neither can there be any doubt that if their intention is carried into effect, it will occasion a great public nuisance. Why, then, is the Court, with those two facts so stated on the record, not to interfere to prevent the nuisance to the public? . . . It is the duty of the Court

Myl. & Cr. 123; *Manchester Railway Co. v. Worksop*, 23 Beav. 198; *Wicks v. Hunt, Johns*, 372; *Elliot v. North-eastern Railway Co.*, 1 J. & H. 145; s. c. 2 De Gex, F. & J. 423; 10 H. L. Cas. 333; *Hext v. Gill*, L. R. 7 Ch. 699; *Wilts Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. 451; *Bickett v. Morris*, L. R. 1 H. L. (Sc.) 47; *McSwiney v. Haynes*, 1 Ir. Eq. 322. Lord Hardwicke so held in cases of waste. *Gibson v. Smith*, 2 Atk. 182. For American cases, see *Van Winkle v. Curtis*, 2 Green Ch. 422; *Shields v. Arndt*, 3 Green Ch. 234, 245; *Hulme v. Shreve*, 3 Green Ch. 116; *Case v. Haight*, 3 Wend. 632; *Corning v. Troy Iron Factory*, 39 Barb. 311; s. c. 34 Barb. 475, 492; 40 N. Y. 191, 220; *Rochester v. Erickson*, 46 Barb. 92; *Burnham v. Kempton*, 44 N. H. 78, 101; s. c. 37 N. H. 485, 488; *Lyon v. McLaughlin*, 32 Vt. 423; *Baltimore v. Appold*, 42 Md. 442; *Varney v. Pope*, 60 Maine, 192; *McArthur v. Kelley*, 5 Ohio, 139; *Bell v. Blount*, 4 Hawks (N. C.) 384. See

Burwell v. Hobson, 12 Gratt. 322, 332; *Gates v. Blincoe*, 2 Dana (Ky.) 158. In *Lyon v. McLaughlin*, 32 Vt. 423, Barrett, J., says: "It would seem to be well settled" "that when the invasion of a right in this kind of property is threatened and intended, which is necessarily to be continuing and operative prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords, in fact, the only adequate and sure remedy. For the very doubtfulness as to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation, render such injury irreparable in the sense of the law relating to this subject."

¹ *Elmhirst v. Spencer*, 2 MacN. & G. 45 (1849).

² *Attorney General v. Forbes*, 2 Myl. & Cr. 123; *Ripon v. Hobart*, 3 Myl. & K. 169.

to take care that while these magistrates attempt to exercise their respective rights, the public shall not sustain any injury, and that a public nuisance shall not be occasioned."

§ 515. The rule is the same in the case of private nuisances. In *Hext v. Gill*,¹ the bill for injunction was filed by a purchaser of land. A former grantor had reserved the mines and minerals, with liberty of ingress and egress, and to dig, search for, and work such minerals. After the conveyance, a bed of china clay, previously unknown, was discovered in the land. The defendants, claiming under the former grantor, had asserted their right to work this bed. It appeared in evidence that china clay was worked by removing the soil covering the clay, turning a stream of water over it, and washing it into channels and reservoirs, producing an almost total destruction of the surface where the excavations were made. It also appeared that the land was underlaid with tin, which was usually worked by "streaming,"—a process equally destructive to the surface of the land. It was held that while the defendants were entitled to take out the minerals, equity would enjoin them from doing it in such a way as to destroy or seriously injure the surface. The defendants by their answer claimed the right to work the minerals, but said that they had no present intention of doing so; and their counsel argued that therefore equity ought not to grant an injunction. Mellish, L. J., after referring to the answer, said: "We are of opinion that after this it is idle for the defendants to say they do not threaten to get the china clay," "and to contend that this Court is precluded from deciding the question whether they are entitled to get it in the way in which they say they have a right to get it."

§ 516. In *Wicks v. Hunt*,² alterations were made in a road which were likely to produce damage to the plaintiff by preventing the escape of water from a marsh. While the alterations were in progress, the plaintiff threatened to take

¹ L. R. 7 Ch. 699, 711.

² *Wicks v. Hunt*, Johns. 372.

proceedings to stop them, but waited for two years, until he had suffered damage by a flood, and then filed his bill for an injunction and for damages. It was held that the plaintiff had lost his equitable right to an injunction by his delay. It follows from this that where the injury may be reasonably expected to occur, unless prevented, the plaintiff need not wait for damage to accrue before filing his bill. On proof that the defendant threatens to do the wrong, where it appears that he has the power, the court will issue the writ or order.¹ In *Mayor of Baltimore v. Appold*,² the allegations were that the defendants intended as a part of a system of water-works, to increase the volume of a stream flowing through the plaintiff's land; that the plaintiff was credibly informed and believed that such increase would cause the stream to overflow its banks and render his land valueless; and these were accompanied by a statement of the facts upon which the bill was founded. It was held that the allegations made out a sufficient case for equitable interference.

§ 517. The danger threatened must be such as to cause reasonable fear of irreparable injury.³ In *Vanwinkle v. Curtis*,⁴ Chancellor Vroom said: "In a court of law the inquiry is whether a wrong has been committed, and if it has been, reparation must be awarded. Here the inquiry is, whether the injury about to be committed is of a serious, permanent, and irreparable character, such as cannot well be compensated in damages, and which therefore requires the extraordinary power of chancery to prevent its commission."

§ 518. It has been held that a mere claim of an adverse right by the defendant, if not exercised or attempted to be

¹ *McArthur v. Kelley*, 5 Ohio, 139, 154; *Manchester Railway Co. v. Work-
son*, 23 Beav. 198, 210.

² *Baltimore v. Appold*, 42 Md. 442.

³ *Earl of Ripon v. Hobart*, 3 Myl. & K. 169; *Vanwinkle v. Curtis*, 2 Green Ch. 422; *Burnham v. Kempton*, 37 N. H. 485, 488; s. c. 44 N. H. 78, 95, 101; *Varney v. Pope*, 60 Maine, 192; *Wheeler v. Steele*, 50 Ga. 34.

The erection of a new mill by the owner of a dam does not involve an increase of flowage, and is not in itself ground for an injunction. *Wheeler v. Steele*, 50 Ga. 24.

⁴ *Vanwinkle v. Curtis*, 2 Green Ch. 422. In *Hathaway v. Mitchell*, 34 Mich. 164, held that equity will not enjoin flowage which may be made lawful at any time.

exercised, may not be ground for an injunction. In Massachusetts, where the plaintiff alleged that the defendants were entitled to draw from a common reservoir 12,335 cubic feet of water per minute, but that they claimed the right to use more, and were preparing works which would require more, and that they threatened to use more water; and the defendants by their answer claimed the right to use more than 12,335 cubic feet, but denied that they had used or intended to use more than they were entitled to, and there was no evidence that they had in fact used more than 12,335 cubic feet, Shaw, C. J., held that upon these pleadings the plaintiff was not entitled to an injunction.¹

§ 519. If the defendant insists upon his alleged right to commit an act which, if completed, will, in the opinion of the court, give a ground of action, equity will protect the plaintiff by injunction.² In the recent case of Attorney General *v.* Acton Local Board,³ which was an action to restrain the board from permitting sewage to flow into a stream, or into the sewers of the Metropolitan Board, the injunction was granted although no substantial damage was shown, on the ground that the defendants by their pleading claimed a right to continue doing that which the court held they were not entitled to do. In *Wilts Canal Co. v. Swindon Waterworks Co.*,⁴ the canal company had, under Act of Parliament, for many years obtained a supply of water from a certain stream. The waterworks company

¹ *Bardwell v. Ames*, 22 Pick. 333, 375. In *Wicks v. Hunt*, Johns. 372, a claim of right, though coupled with a disclaimer of present intention to exercise it, was held ground for injunction.

² *Tipping v. Eckersley*, 2 K. & J. 264; *Goodson v. Richardson*, L. R. 9 Ch. 221; *Lowndes v. Bettle*, 33 L. J. Ch. 451 (a case of waste).

³ *Attorney General v. Acton Local Board*, per Fry, J., 22 Ch. D. 221.

⁴ *Wilts Canal Co. v. Swindon Waterworks Co.*, L. R. 9 Ch. 451. So,

if the defendant persists in a course which will, if continued, ripen into an adverse right, the plaintiff is entitled to an injunction. *Per Mellish, J., supra.* See, also, *Barnes v. Sabron*, 10 Nev. 247; *Brown v. Ashley*, 16 Nev. 311. In cases where the defendant makes such a claim, the plaintiff will be entitled to an injunction without proof of any present damage. *Crosley v. Lightowler*, L. R. 2 Ch. 478; *Goodson v. Richardson*, L. R. 9 Ch. 221.

afterwards diverted a portion of this stream, and thereby supplied the neighboring town, and an injunction was sought to prevent this injury. Lord Justice James said: "But the defendants not only allege that there was no damage, but they have put most distinctly and clearly on their answer a claim of right of such a kind as to make it absolutely imperative on this Court, as it seems to me, to determine the question of right and to declare the right one way or the other; and as the matter now stands, with the bill dismissed by the Vice Chancellor with costs, it is an adjudication in favor of the defendants that they have the right they claim. It is true that one of their defences is that there has been no injury to the plaintiffs; but it appears to me that the plaintiffs are entitled to have a declaration from the Court that the defendants are not at liberty to divert the water from the Wroughton Stream into their réservoir, for their own purposes and profits whenever the demand on them for water requires it." Lord Justice Mellish, in a concurring opinion, held that equity would protect a substantial right from loss by a continuous invasion and long user by a wrongdoer, on the same ground as that on which courts at law entertain an action in such cases.

§ 520. Where the defendant persists in injuring the plaintiff by a wrongful course of action, equity will take jurisdiction, although the damage caused is at the time of suit inconsiderable. In such cases the only legal remedy open to the plaintiff is a series of actions from day to day. But where the defendant so persists in his wrongful act after the plaintiff has exhausted his legal remedy by actions at law, equity holds that the legal remedy is shown to be inadequate, and interferes to protect his right.¹ Referring to the repeated

¹ Rochdale Canal Co. v. King, 2 Sim. n. s. 78; Attorney General v. Luton Local Board, 2 Jur. n. s. 180; Clowes v. Staffordshire Waterworks Co., L. R. 8 Ch. Ap. 125; Pennington v. Brinsop, 5 Ch. D. 769; Society v. Morris Canal Co., 1 Saxt. 157, 191; Hill v. Sayles, 12 Cush. 454; Carlisle v. Stevenson, 3 Md. Ch. 499; Coe v. Winnipiseogee Lake Co., 37 N. H. 254, 265; Corning v. Troy Iron Factory, s. c. 39 Barb. 311, 327; 34 Barb. 492; Smith v. Olmstead, 5 Blackf. 37; Whitfield v. Rogers, 23 Miss. 84; Fairhaven Marble Co. v. Adams, 46 Vt. 496; Lyon v. Mc-

actions to which the plaintiff might be driven at law, Lord Justice Mellish said: "It is because it is most inconvenient to leave the rights of parties to be determined in that way, and in fact impossible to leave in that way, that this Court has always in such cases given relief."¹ Another reason frequently given for equitable cognizance of such cases is the prevention of a multiplicity of suits. But this, as we shall see, is not a proper application of that principle.² It has been said that repeated actions at law are necessary to demonstrate their inadequacy to protect the plaintiff,³ but the better opinion seems to be that, after the plaintiff has established his right by one action at law, he may have an injunction restraining the defendant from continuing the grievance.⁴

§ 521. The plaintiff must in his bill set forth his title, or, if his interest is limited, the facts constituting his interest,⁵ and must allege facts showing the nature and extent of his injury, and the inadequacy of the remedy at law.⁶ If he sets

Laughlin, 32 Vt. 423, 425, 426; *Sword v. Allen*, 25 Kansas, 67; *Cotton v. Mississippi Boom Co.*, 19 Minn. 497.

¹ *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125, 142.

² That the principle of preventing multiplicity of suits has no proper application to these cases, see *Hart v. Albany*, 9 Wend. 571, 581; *Jerome v. Ross*, 7 Johns. Ch. 315, 336. And see *post*, §§ 562 *et seq.*

³ *Carlisle v. Stevenson*, 3 Md. Ch. 499, 506.

⁴ *Rochdale Canal Co. v. King*, 2 Sim. n. s. 78.

⁵ *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 16 Pick. 512; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Wason v. Sanborn*, 45 N. H. 169. So if the bill is for the protection of an easement, it is necessary to allege title to the right claimed, as an incident to land, or by grant or prescription. An allegation of title to flow, by grant from

all the owners of land known to be flowed, is *prima facie* sufficient. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420. See 1 High on Injunctions, §§ 34-36; Kerr on Injunctions, 13.

⁶ *Ripon v. Hobart*, 3 My. & K. 169; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Welton v. Martin*, 7 Mo. 307; *Olmstead v. Loomis*, 6 Barb. 152; *Perkins v. Collins*, 2 Green Ch. 482; *Fairhaven Marble Co. v. Adams*, 46 Vt. 496, 503; *Corning v. Troy Iron Factory*, 6 How. Pr. 89. Where the plaintiff has only a limited right in a stream, he must show an injury to such right. *Oldaker v. Hunt*, 6 De Gex, M. & G. 373. A lessee is entitled to an injunction against the continuance of a nuisance interfering with his enjoyment of the possession. The wrongful continuance of a drain across his land is such an injury. *McAuley v. Roberts*, 5 Grant's Ch. Cas. (Up. Can.) 565.

forth a title which would be insufficient at law, the bill is open to demurrer.¹ "The mere allegation," said Chancellor Johnson, "that irreparable injury will result to the complainant unless protection is extended to him, is not sufficient; the facts must be stated, that the Court may see that the apprehensions of irreparable mischief are well founded."²

§ 522. It is generally true that allegations upon information and belief will not be sufficient to obtain an injunction;³ but we have seen that in *Baltimore v. Appold*⁴ an allegation that the plaintiff was credibly informed and believed that the threatened increase in the volume of the stream would render his lands valueless, together with the statement of facts upon which his belief was founded, was held sufficient.

§ 523. It is also necessary for the plaintiff to make a full statement of the entire case upon which he desires the intervention of the court; and if he withholds material facts, this will be ground for denying the relief.⁵

¹ Kerr on Injunctions, 31.

² *Carlisle v. Stevenson*, 3 Md. Ch. 499, 505. A somewhat different rule is laid down in *Sprague v. Rhodes*, 4 R. I. 301, 303, 310, 312. The case was upon a bill to enjoin the defendants from continuing to flow the plaintiff's lands, and a demurrer was filed for want of equity. Ames, C. J., said: "We are not at liberty to infer from facts stated in the bill, facts unfavorable to the plaintiff's right to relief, if indeed we are not bound to make, as in case of a demurrer to evidence at law, every reasonable intendment in his favor. . . . Another ground of demurrer set up by the defendants is that the bill does not state a case of irreparable or destructive mischief. The case stated in the bill is a flowage of the lands of the plaintiffs, in its nature as destructive a nuisance to land, for all the purposes of land, as distinguished from water, as can well be imagined, provided the flow be to any considerable extent. It is true that

the bill does not allege the extent of the flow; but under the allegations of the bill, the plaintiffs will be at liberty to prove a flow to *any* extent; and again, under the rules first adverted to, applicable to demurrers of this sort, we have no right to intend against the bill that a flow cannot be proved to any the most destructive extent imaginable.

This bill is certainly very meagre in its statements, and quite possibly, as suggested by the counsel for the defendants, was purposely so drawn to escape a demurrer, to which a fuller statement of the truth of the case would have properly subjected it. If this be so, the defendants will have the advantage of this yet undisclosed truth by way of defence in their answers and proofs; but for the reasons above stated, this demurrer cannot be allowed, and the defendants must answer over."

³ 1 High on Injunctions (2d ed.), § 35.

⁴ 42 Md. 442, 476; *ante*, § 516.

⁵ *Reddall v. Bryan*, 14 Md. 444. *In*

§ 524. Where the plaintiff's allegations show a good title *prima facie*, and an injury present or threatened, which if established would be reasonable ground for the interference of equity, a preliminary injunction is usually granted upon the filing of the bill, to preserve the property in dispute *in statu quo* until the parties' rights can be determined, or until further order.¹ In order to entitle himself to a perpetual injunction, it is necessary for the plaintiff strictly to prove his allegations. And if the testimony as to the injurious consequences of the act complained of, as *e.g.*, the maintenance of a dam, consists merely of opinions which are opposed by similar testimony, the court will be slow to grant a perpetual injunction.²

§ 525. Where the plaintiff's right and his need of the protection of the court are clear, it is said that equity will determine the rights of the parties at once, and grant a final injunction without further delay.³ But the case must be

this case, the plaintiff sought to enjoin the construction through his land of an aqueduct, which was to supply the city of Washington with water. Bartol, J., said: "In the opinion of a majority of this Court, the nature of the acts complained of in this bill, and of the injury alleged, is such as to present a case of irreparable damage, which would entitle the complainant to the interposition of a court of equity by injunction, if it sufficiently appeared on the face of the bill that the acts charged were done by the defendants without authority of law. We think there is great force in the view taken by the Circuit Court of the manner in which the case of the complainant is stated in the bill, and cannot avoid the conclusion 'that it is made out by the concealment of facts having a very important bearing upon it, and which would (if fully stated) act materially upon the conscience of the court.' The right to an injunction is not *ex debito justitiæ*, but such application is addressed to the sound

conscience of the chancellor, acting upon all the circumstances belonging to each particular case. He has the right to require a full and candid disclosure of all the facts, and if there appears in the proceedings sufficient to show that this has not been made, he may properly refuse to exercise the extraordinary power of the court, through the instrumentality of a writ of injunction." *Ibid.*

¹ *Buller v. Society*, 12 N. J. Eq. 264; *Morris Canal Co. v. Central Railroad Co.*, 16 N. J. Eq. 419, 425; *Arthur v. Case*, 1 Paige, 447; *Troy v. Norment*, 2 Jones Eq. (N. C.) 318; *Richmond v. Dubuque Railroad Co.*, 33 Iowa, 482; *United States v. Duluth*, 1 Dillon, 469; *McCallum v. Germantown Water Co.*, 54 Penn. St. 40; *Sprague v. Rhodes*, 4 R. I. 301, 309; *Phillips v. Stockel*, 1 Tenn. 200; *Ripon v. Hobart*, 3 Myl. & K. 169, 181, 182; *Beaufort v. Morris*, 6 Hare, 340.

² *Woodruff v. Lockerby*, 8 Wis. 369.

³ *Kerr on Injunctions*, 26. *Bacon v. Jones*, 4 Myl. & Cr. 433. In this case (relating to a patent), Lord

very clear to lead the court to adopt such a course.¹ Where the right is uncertain, or the nature of the alleged injury is not clearly such as to require a permanent order of the court, equity may either grant an interlocutory injunction pending the trial of the right, or may direct the plaintiff first to establish his right at law, or put over the motion until after the hearing. In determining which course to pursue, the court will consider the situation of the parties and the comparative inconvenience which will be caused by the order. If a temporary injunction would cause serious damage to the defendant, in case the plaintiff should fail to establish his right, and would not materially benefit the plaintiff, if successful, it will be withheld until after the hearing;² but if, assuming the facts alleged to be true, more harm would be caused to the plaintiff by withholding the order than, in the event of his failure, would be caused to the defendant by granting it, it will be granted.³

§ 526. The controlling principle, in the absence of special circumstances, is, in the language of Lord Brougham, "that only such a restraint shall be imposed as may suffice to stop

Chancellor Cottenham said: "When the application is for an interlocutory injunction, several courses are open: the Court may at once grant the injunction, *simpliciter*, without more, — a course which, though perfectly competent to the Court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual and, as I apprehend, more wholesome practice in such a case of either granting an injunction, and, at the same time, directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account. Which of these several courses ought to be taken must depend entirely upon

the discretion of the Court, according to the case made."

¹ *Mayor v. Cardiff Waterworks*, 4 D. G. & J. 596; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335.

² *Ripon v. Hobart*, 3 Myl. & K. 169, 182; *Elmhirst v. Spencer*, 2 MacN. & G. 45; *Ingraham v. Dunnell*, 5 Met. 118, 123, 127; *Wason v. Sanborn*, 45 N. H. 169. See *Kerr on Injunctions*, 27, 28.

³ *Ibid.* *Attorney General v. Johnson (per Lord Eldon)*, 2 Wils. 87, 97. For similar reasoning applied to injunctions generally, see *Wood v. Sutcliffe*, 2 Sim. n. s. 163; *Attorney General v. Birmingham*, 4 K. & J. 528; *Pennington v. Brinsop*, 5 Ch. D. 769; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Bassett v. Salisbury Manuf. Co.*, 47 N. H. 426; *Wilcox v. Wheeler*, 47 N. H. 488; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333.

the mischief complained of, and where it is to stay farther injury, to keep things as they are for the present.”¹ Where the United States had filed a bill in the Circuit Court for an injunction to protect improvements which it was making in its navigable waters, and conflicting affidavits were filed as to the effect of the works sought to be enjoined, Miller, J., in delivering the opinion, granting a temporary injunction, said: “In this emergency I am relieved by a principle which has generally governed me, and which I believe governs nearly all judges in applications for preliminary injunctions. It is that, when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. In this case I am not satisfied that it is so refuted.”²

§ 527. Where the plaintiff, with knowledge of his rights, has acquiesced in the act of the defendant, or has been guilty of laches in the pursuit of his remedy, this will generally be sufficient to prevent his obtaining the preliminary injunction, his conduct being taken as proof that the danger is not so imminent as to require an interference by the court before his right is established.³ A less degree of acquiescence or delay will defeat the plaintiff’s application for a preliminary injunction than is necessary to operate as a bar to equitable interference when his right is established.⁴ It is always open to the plaintiff to explain his conduct, and show excuse for his delay, although he has not alleged it in his bill.⁵ An acquiescence in an injury which at the time is

¹ *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154, 185.

² *United States v. Duluth*, 1 Dillon, 469, 474.

³ *Weller v. Smeaton*, 1 Bro. C. C. 572; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 87; *Ware v. Regent’s Canal Co.*, De Gex & J. 212, 230; *Wicks v. Hunt*, Johns. 372;

Reid v. Gifford, 6 Johns. Ch. 19; *Society v. Holsman*, 1 Halst. Ch. 126; *Carlisle v. Cooper*, 21 N. J. Eq. 576. See *Sprague v. Rhodes*, 4 R. I. 301.

⁴ *Attorney General v. Birmingham*, 4 Kay & J. 528, 545, 546; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146, 160.

⁵ *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349.

small, and which might reasonably be supposed to be temporary, is no bar to an application for relief when the same injury has increased to serious proportions, and is likely to become permanent.¹ So delay which has been induced by the defendant's representations will not prejudice the application.² If the character of the act is not defined, and it is necessary to wait for some time to ascertain its injurious nature and consequences, or if it is continually growing, as in case of the retention of offensive water in a canal,³ or the corruption of a stream by sewage,⁴ such delay will not operate as a bar. Where an interlocutory application is granted for the purpose of protecting the plaintiff in a legal right which is still in dispute, the court will provide in the order for the speedy trial of the right.⁵

§ 528. Upon the establishment of his legal rights, and of an injury not adequately remediable at law, the plaintiff is usually entitled, as of course, to a perpetual injunction.⁶ The balance of convenience between the parties will be considered in deciding upon the plaintiff's right to a perpetual injunction, as well as upon the interlocutory motion;⁷ but in general a much more serious case of inconvenience to the defendant is necessary to induce the court to withhold a final injunction than is sufficient to defeat the interlocutory motion. Where the plaintiff has made out a strict case of right, he will usually be protected, although the defendant is seriously inconvenienced thereby.⁸ So where the plaintiff

¹ Attorney General *v.* Halifax, 17 W. R. 1088; Goldsmid *v.* Tunbridge Wells, L. R. 1 Ch. 349, 355; Attorney General *v.* Luton Local Board, 2 Jur. n. s. 180.

² Attorney General *v.* Luton Local Board, 2 Jur. n. s. 180. See Attorney General *v.* Birmingham, 4 Kay & J. 528, 546.

³ Attorney General *v.* Bradford Canal, L. R. 2 Eq. 71.

⁴ Attorney General *v.* Halifax, 17 W. R. 1088; Attorney General *v.* Leeds, L. R. 5 Ch. 583.

⁵ Beaufort *v.* Morris, 6 Hare, 340

(*per* Wigram, V. C.); Dewhirst *v.* Wrigley, Cooper Prac. Cas. 319.

⁶ Kerr on Injunctions, 344; Wood *v.* Sutcliffe, 2 Sim. n. s. 165.

⁷ Wood *v.* Sutcliffe, 2 Sim. n. s. 163; Attorney General *v.* Birmingham, 4 K. & J. 528; Pennington *v.* Brinsop, 5 Ch. D. 769; Eastman *v.* Amoskeag Manuf. Co., 47 N. H. 71; Basset *v.* Salisbury Manuf. Co. 47 N. H. 426; Wilcox *v.* Wheeler, 47 N. H. 488.

⁸ Attorney General *v.* Birmingham, 4 K. & J. 528; Spokes *v.* Banbury Board, L. R. 1 Eq. 42; Attorney General *v.* Bradford Canal, L. R. 2 Eq. 71.

was entitled to the flow of a stream in its natural purity, and the defendants, in the construction of a system of drainage, turned the sewage of a large district into the stream, Vice Chancellor Wood, in granting an injunction, said: "There are cases at law in which it has been held that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience to the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, the question is simply whether he has those rights, and if so, whether the Court, looking to the precedents by which it must be governed in the exercise of its judicial discretion, can interfere to protect them. Now, with regard to the question of the plaintiff's right to an injunction, it appears to me, that so far as this Court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. The rights of the plaintiff must be measured precisely as they have been left by the Legislature."¹

§ 529. It is no part of the office of the court to consider the ways and means by which the defendant may comply with its acts. In a case of corrupting water by sewage,¹ the same judge (Lord Chancellor Hatherley) said: "Cases like the present no doubt show the difficulty in which persons who are desirous of getting rid of refuse sewage are constantly placed; but it is a difficulty which must be met, not by applying to a court of law to escape from the exigencies of the condition in which they find themselves, but by an application to the Legislature. Now, I believe the Court will always find that its simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties, and having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those

¹ *Attorney General v. Birmingham*, 4 K. & J. 528, 539.

against whom it is obliged to decide, leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and if there be no other mode of escape, to cease to do the acts which occasion the wrong."¹

§ 530. Acquiescence or laches by the party injured may bar his right to the interference of equity even though the legal right is clearly made out,² but a greater degree of consent or delay is necessary than in the case of the interlocutory motion.³ Any contribution by the plaintiff to the

¹ Attorney General *v.* Colney Hatch Asylum, L. R. 4 Ch. 146, 153. In a similar case the same judge, sitting as Vice Chancellor, held that, where the defendants failed to comply with the order, alleging that they had found no means of deodorizing the nuisance, and that obedience was practically impossible, the defendants were guilty of gross contempt, and a sequestration was ordered. *Spokes v. Banbury*, L. R. 1 Eq. 42. See *ante*, § 223.

² *Rochdale Canal Co. v. King*, 2 Sim. n. s. 78; 16 Beav. 630; *Wood v. Sutcliffe*, 2 Sim. n. s. 163; *Jones v. Royal Canal Co.* 2 Molloy, 319; *Attorney General v. Halifax*, 39 L. J. Ch. 129. Facts held not to amount to laches. *Attorney General v. Birmingham*, 4 K. & J. 528; *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601; *Heiskell v. Gross*, 7 Phila. 317; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Trenton Water Power Co. v. Chambers*, 1 Stockt. Ch. 471; and see *Coalter v. Hunter*, 4 Rand. 59; *Sprague v. Steere*, 1 R. I. 247; *Sheldon v. Rockwell*, 9 Wis. 106; *Cobb v. Smith*, 16 Wis. 661; *Crosby v. Smith*, 19 Wis. 449; *Blanchard v. Doering*, 23 Wis. 200; *Prentiss v. Wood*, 118 Mass. 589.

³ *Attorney General v. Birmingham*, 4 K. & J. 528, 545, 546; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146, 160; *Carlisle v. Cooper*, 6 C. E. Greene, 576.

In Hartlepool Gas Co. v. West Hartlepool Harbor Co., 12 L. T. N. S. 366, Vice Chancellor Kindersley said: "We are now on the hearing of the cause, and not on an interlocutory application, and the question is whether there really has been any such omisive conduct on the part of the plaintiffs as to deprive them of the right which otherwise they would have. It appears to me that there has not. Upon this hearing, whatever question might have been raised upon an interlocutory application, there is nothing whatever which amounts to acquiescence or abandonment, and unless it amounts to one or the other, the plaintiffs are not deprived of the right to relief." The delay in that case had been continued for twelve years before bringing suit. The plaintiff is sometimes placed in a dilemma between the rule against laches and that against merely prospective injuries. In such cases the court may issue a general order forbidding acts which will amount to a nuisance, and retain the bill, with leave to the plaintiff to apply for further order. See *Elwell v. Crowther*, 31 Beav. 163; 10 W. R. 615; *Wicks v. Hunt, Johns*. 372. In *Carlisle v. Cooper*, 21 N. J. Eq. 576, 591; 19 N. J. Eq. 256), the New Jersey Court of Errors and Appeals, *per* Depue, J., said: "Mere delay in applying to the court

acts producing the injury *a fortiori* bars his right to an injunction.¹ Such acquiescence is not only a bar to the injured party's right to an injunction, but may become a ground for a counter injunction against any proceedings either at law or in equity.²

§ 531. Acquiescence is no bar to the plaintiff's right where his position does not entitle him to object to the act

is frequently a ground for denying a preliminary injunction, and is also a reason for courts of equity refusing to take cognizance of a case where there is a remedy at law. But where the legal right is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief. A person may so encourage another in the erection of a nuisance as not only to be deprived of the right of equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance (citing *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91). So a party who knowingly, though passively, encourages another to expend money under an erroneous opinion of his rights, will not be permitted to assert his title, and thereby defeat the just expectation upon which such expenditure was made." "The defendant's case is not within either of these principles. He did not make his expenditure in erecting his dam and increasing the capacity of his mill, either upon the encouragement of the complainant's ancestor, or under an impression that he had a right to cast the water back to the extent it was held by his dam. He knew that by so doing he would interfere with the complainant's farm. He claims that he obtained that privilege from the complainant's ancestor, under a verbal agreement that he was to be permitted to flow as much of his

lands as he, the defendant, saw fit, if he paid him therefor at the same rate as the defendant paid one Horton for lands on the opposite side of the stream. Upon such alleged agreement the defendant sought his remedy, after the actions at law were brought, by a bill for its specific performance, and was denied relief (*Cooper v. Carlisle*, 18 N. J. Eq. 241). The adjudication and decision of that question in that case concludes the rights of these parties."

¹ *Carlisle v. Stevenson*, 3 Md. Ch. 499. So in the case of license to maintain a dam. *Ogle v. Dill*, 55 Ind. 130.

² *Eq. Cas. Abr.* 522. "A. diverted a watercourse, which put B. to great expenses in laying Sooths, etc., and the diversion being a nuisance to B., he brought his action; but an injunction was decreed upon a bill exhibited for that purpose, it being proved that B. did see the work when it was carrying on and connived at it, without showing the least disagreement, but rather the contrary." See, also, *Sprague v. Steere*, 1 R. I. 247, 259; *Trenton Banking Co. v. McKelway*, 4 Halst. Ch. 84; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; *Carlisle v. Cooper*, 21 N. J. Eq. 576, cited *supra*; *Cobb v. Smith*, 23 Wis. 261; *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, 608; *Society v. Lehigh Valley Railroad Co.*, 32 N. J. Eq. 329. Same rule in case of noxious trade. *Williams v. Jersey*, Cr. & Ph. 97.

in question. Thus if A., owning land on one side of a stream, takes a lease of the land opposite, and then diverts water from the leased premises, in favor of his land on the other side, the diversion is not, during the life of the lease, adverse to the lessor, and his acquiescence is no bar to his right to have the land and water restored in their original condition. It does not diminish this right that the tenant has made expensive improvements upon his other land in order to use the water so diverted. He knew that his right to divert the water terminated with the lease. And the landlord may, by conveying the land, transfer his right to another. If the alienee has owned other lands injured by the diversion, in respect of which he was barred by acquiescence, such acquiescence does not affect the right he acquires by purchasing the leased land to have the latter tract uninjured by the diversion, and if the former tenant continues the diversion, the purchaser is entitled to an injunction.¹

§ 532. Since laches or acquiescence in the defendant's act for less than the prescriptive period may defeat the plaintiff's right to an injunction,² *a fortiori* adverse possession and exercise of any right in water, in derogation of the rights of other owners for twenty years, or for a period sufficient to establish a prescriptive right, necessarily defeat the right of such owners to an injunction against a private nuisance.³

¹ *Corning v. Troy Iron Factory*, 40 N. Y. 191, 201; 34 Barb. 485; 39 Barb. 311. Where A. gave a parol license to B. to erect and maintain a dam and ditch upon A.'s land, to supply with water a mill on B.'s land, and A. afterwards sold his land to C. without any reservation, and C. objected to the dam and ditch, and requested B. not to maintain them, but B. continued to use them and forcibly prevented C. from removing them, and the dam and ditch were found to constitute a nuisance, it was held that C. was not bound by the license given

by A., and was entitled to an injunction restraining B. from maintaining the dam. *Stevens v. Stevens*, 11 Met. 251.

² *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601.

³ *Shields v. Arndt*, 3 Green Ch. 234; *Holsman v. Boiling Spring Co.*, 1 McCarter, 334, 345; *Coalter v. Hunter*, 4 Rand. 58; *McCallum v. Germantown Water Co.*, 54 Penn: St. 40; *Pratt v. Lamson*, 2 Allen, 275; *Ogle v. Dill*, 55 Ind. 130. See 1 High on Injunctions (2d ed.), § 799. But where one has erected a dam upon

In the case of a public nuisance the right of the public is, upon principle, never barred. One cannot acquire a prescriptive right to maintain a public nuisance;¹ and no prescription will deprive the public of the remedies against such an injury.²

§ 533. Neglect on the part of the public may create such an equitable estoppel as to lead courts of equity to decline to exert the extraordinary remedy of an injunction in its behalf. Such neglect is not in any sense a bar of the right of the public, but is a circumstance to be considered by the court, in connection with the other circumstances of the case, in determining whether the conduct of the plaintiff justifies an interference by equity. Thus, in *Attorney General v. Johnson*,³ which was a case of purpresture, Lord Eldon said: "If the king's subjects have permitted the erection of a building which they were aware would, when completed, be a nuisance, without promptly applying to the Court to prevent it, the Court would not consider them entitled to the extraordinary assistance of a Court of Equity, but leave them to their legal remedy." In *Attorney General v. Bradford Canal*,⁴ Vice Chancellor Wood expressed a similar opinion. This was the *ratio decidendi*, so far as the public right was concerned in the case of Attorney

the lands of another, without right, nothing short of adverse user for the full time will give him a right, or entitle him to an injunction against obstructions of his raceway. *Sherwood v. Vliet*, 20 Wis. 441. For a case insisting upon the necessity that the user be adverse, see *Lehigh Valley Railroad Co. v. McFarlan*, 30 N. J. Eq. 180.

¹ *Vooght v. Winch*, 2 B. & Ald. 662; *Weld v. Hornby*, 7 East, 199; *Stoughton v. Baker*, 4 Mass. 522, 528; *Commonwealth v. Upton*, 6 Gray, 473; *Mills v. Hall*, 9 Wend. 315; *Dygert v. Schenck*, 23 Wend. 446; *Jersey City v. Morris Canal Co.*, 1 Beas. (N. J.) 547, 600; *Cross v. Morristown*, 18 N.

J. Eq. 305; *Wright v. Moore*, 38 Ala. 593; *Rhodes v. Whitehead*, 27 Texas, 304, 316; *Regina v. Brewster*, 8 Up. Can. C. P. 208. As prescriptive rights are supported upon the presumption of a lost grant, such a right to maintain a nuisance can never be established, because any grant of such right would be beyond the power of the public representatives, and void. *Staffordshire and Worcestershire Canal v. Birmingham Canal*, 1 App. Cas. 254; *Burbank v. Fay*, 65 N. Y. 57. See *ante*, § 331.

² *Rochester v. Erickson*, 46 Barb. 92.

³ 2 Wils. C. C. 87, 102.

⁴ L. R. 2 Eq. 71.

General v. Sheffield Gas Consumers Co.,¹ where Turner, L. J., said: "That delay will affect the Attorney General as much as a private individual I am not prepared to say; but in my opinion, it is a circumstance to be considered in determining the question whether this Court shall interfere, although the application to the Court be on behalf of the Attorney General, and I ground myself in that opinion upon what fell from Lord Eldon in the case of the Attorney General *v. Johnson*." But where the public makes out a plain case of injury by nuisance, and shows that it has no adequate remedy at law, it seems that its right to the protection of a court of equity will not be lost by the delay or neglect of its servants in asserting its rights.²

§ 534. The principles upon which equity interferes, as stated in the foregoing sections, are accepted in all jurisdictions administering equitable relief, but in applying them to concrete cases widely different results have been reached. The diversion or obstruction of a watercourse has been the subject of frequent equitable interference by way of injunction, both in England and America.³ It is said that a diver-

¹ 3 De Gex, M. & G. 304, 324. In that case the alleged injury to the public was called an afterthought by Lord Cranworth (p. 314), and was lightly treated by the court. See a remark of Wood, V. C., distinguishing the case, in *Attorney General v. Plymouth*, 1 W. R. 445.

² *Rochester v. Erickson*, 46 Barb. 92. In this case the decision is apparently contrary to the English decisions cited above. An injunction was sought to restrain the defendants from repairing a building projecting into a river, which had stood in that position for about forty years. The court said: "If it is such a nuisance, no period of use and occupancy, however extended and uninterrupted, and under whatever claim of right, will protect it from abatement by the public authorities, or the preventive remedy by injunction to restrain its

perpetuation by additions and repairs." And see *Wright v. Moore*, 38 Ala. 593, where a dictum of similar effect was made in an injunction case. Most of the cases in which the question has been raised are where the State, in its sovereign capacity, has exercised the harsher remedy of indictment or abatement. This has frequently been done after the nuisance has continued for above twenty years. *Stoughton v. Baker*, 4 Mass. 522; *Commonwealth v. Upton*, 6 Gray, 473; *Mills v. Hall*, 9 Wend. 315; *Renwick v. Morris*, 3 Hill, 621; *Rhodes v. Whitehead*, 27 Texas, 304, 316. See 1 Russell on Crimes (9th Am. ed.), 456.

³ *Bush v. Western*, Prec. in Ch. 530; *Weller v. Smeaton*, 1 Bro. C. C. 572; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Universities v. Richardson*, 6 Ves. 706; *Lane v. Newdigate*, 10 Ves. 194; *Rochdale Canal Co. v. King*,

sion will not be restrained by injunction where there is ample water left for the plaintiff's needs.¹ So if the water diverted be returned in undiminished quantity before reaching the plaintiff's premises, equity will not interfere.² And where an upper mill-owner, who diverts water for his mill, offers to discharge it directly into the plaintiff's race above his mill, and to give the plaintiff the full benefit of its use, such diversion will not be enjoined.³ So if there is a channel departing from the main stream, and returning, and the defendant cut a raceway from the main stream, giving the narrower channel a straighter course, but not decreasing the amount of the main stream, there is no injury cognizable in equity.⁴

2 Sim. n. s. 79; *Blakemore v. Glamorganshire Canal*, 1 My. & K. 154; *Elwell v. Crowther*, 31 Beav. 163; *Chalk v. Wyatt*, 3 Meriv. 688; *Martin v. Stiles*, Mosely, 145; *Tipping v. Eckersley*, 2 K. & J. 264; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Attorney General v. Great Eastern Railway Co.*, L. R. 6 Ch. 577; *Wilts Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. 451; *Clowes v. Staffordshire Water Works Co.*, L. R. 8 Ch. 125; *Webb v. Portland Manuf. Co.*, 3 Sumner, 189; *Tyler v. Wilkinson*, 4 Mass. 397; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 273; 3 Johns. Ch. 282; *Case v. Haight*, 3 Wend. 632; *Arthur v. Case*, 1 Paige Ch. 447; *Seneca Woolen Mills v. Tillman*, 2 Barb. Ch. 9; *Varick v. Smith*, 5 Paige, 137; *Reid v. Gifford*, Hopk. Ch. 416; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 34 Barb. 485; 39 Barb. 311; *Corning v. Troy Factory*, 6 How. Pr. 89; *Garwood v. N. Y. Central Railroad Co.*, 17 Hun, 356; *Binney's Case*, 2 Bland Ch. 99; *Lamborn v. Covington*, 2 Md. Ch. 409; *Scudder v. Trenton Delaware Falls*, 1 Saxt. (N. J.) 694; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Shreve v. Voorhees*, 2 Green Ch. 25; *Shields v. Arndt*, 3 Green Ch.

234; *Hulme v. Shreve*, 3 Green Ch. 116; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Denton v. Leddell*, 23 N. J. Eq. 64; *Sprague v. Rhodes*, 4 R. I. 301; *Bemis v. Upham*, 13 Pick. 169; *Bardwell v. Ames*, 22 Pick. 353, 379; *Smith v. Olmstead*, 5 Blackf. 37; *Burden v. Stein*, 27 Ala. 104; *Wright v. Moore*, 38 Ala. 593; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *White v. Forbes*, Walker's Ch. (Mich.) 112. See *Fleming's Appeal*, 65 Penn. St. 444; *Switzer v. McCullough*, 15 Reporter (Boston) 157; *Shively v. Hume*, Curtis's Oregon Dig. 318.

¹ *Cilly v. Cincinnati*, 2 Cin. Weekly Bulletin, 135. So where the injury complained of was done and completed by the acts of others than the defendants, an injunction will not lie to restrain the defendants from acts which will work no injury. An alleged injury to the bare right of navigating a canal which has been abandoned and in part filled up by others, is no ground for an injunction. It is a mere *damnum absque injuria*. The injury which the party apprehends must be real. *Erkenbrecher v. Este*, 1 Cin. Sup. Ct. 368.

² *Elmhirst v. Spencer*, 2 MacN. & G. 45; *Canfield v. Andrews*, 54 Vt. 1.

³ *Mason v. Cotton*, 2 McCrary, 82.

⁴ *Potier v. Burden*, 38 Ala. 651.

§ 535. The obstruction of an artificial channel, in which the plaintiff is entitled to the flow of water, is equally within the remedial powers of courts of equity.¹ So if the plaintiff has, by grant or otherwise, the right to convey water through a conduit beneath the surface of the defendant's land, and the defendant wrongfully stops the channel or cuts the pipes, the plaintiff is entitled to an injunction.² And if the plaintiff's right is merely that of a licensee, but the defendant has encouraged the expenditure of money in constructing the course, and acquiesced in its use, equity will restrain the defendant from obstructing it.³

§ 536. Where water flows from surface springs, though not in a perfectly defined channel, into adjoining lands, the owners of such lands are entitled to the flow, and will be protected in it by injunction against any diversion by the owner of the springs.⁴ The discharge of surface-water through an artificial channel, upon the lands of another, is ground for an injunction,⁵ subject to the general principles heretofore stated, as that the injury must be beyond compensation at law.⁶

¹ *Dewhirst v. Wrigley*, 1 C. P. Cooper, 319; *Manser v. Northern Railway Co.*, 2 Ry. & C. Cas. 380; *Coats v. Clarence Railway Co.*, 1 Russ. & My. 181; *Varick v. Smith*, 5 Paige, 137; *Sanderlin v. Baxter*, 6 Va. L. J. 278. An injunction will be granted to restrain the obstruction of a canal constructed pursuant to a statute for the purpose of draining a swamp. *Houston v. Wheeler*, 52 N. Y. 641.

² *Devonshire v. Eglin*, 14 Beav. 530; *Legg v. Horn*, 45 Conn. 409; *Wilcox v. Wheeler*, 47 N. Y. 488.

³ *Devonshire v. Eglin*, 14 Beav. 530; *Legg v. Horn*, 45 Conn. 409. But see *Owen v. Field*, 12 Allen, 457. In this case no facts of acquisition are stated. The plaintiff had been conveying water across the defendant's land by an aqueduct under a license; the defendant revoked the license and took up the aqueduct.

The court refused to enjoin him from preventing the plaintiff from replacing it.

⁴ *Ennor v. Barwell*, 2 Giff. 410; 4 L. T. n. s. 597; *Foot v. Van Giesen*, 4 Lans. 47. For a similar case at law, see *Dudden v. Clutton Union Co.*, 1 H. & N. 627. It is no justification of a detention of water which flows in a natural channel and supplies the lands of the plaintiff that the defendant intercepted the flow at its source on his own land, nor is it any defence in such case to show that the water has been ponded in a reservoir which may be needed to supply a town with water under a contract made by the defendant with the town. *Howe v. Norman*, 13 R. I. 488.

⁵ *Pettigrew v. Evansville*, 25 Wis. 223; *Davis v. Londgreen*, 8 Neb. 43; *Hicks v. Silliman*, 93 Ill. 255.

⁶ *Laney v. Jasper*, 39 Ill. 46.

§ 537. The unreasonable detention and discharge of water by alternately opening and closing the gates of a dam is an injury remediable by injunction.¹ So the wrongful opening of the gates of a dam, letting down a flood of water and preventing the prosecution of a lawful public work in the stream, will be prevented by injunction.² Where one has lawfully maintained a dam at a certain height, a wrongful increase in its height is not necessarily an injury beyond the powers of courts of law to remedy.³ But where a dam maintained at a lawful height did not affect the plaintiff's land, and the increase of height caused its overflow, it was held that equity would prevent such injury, and to that end would determine the proper height of the dam, and forbid its maintenance above that height.⁴ Where the alleged injury results from conflicting uses of a common stream, equity will determine the rights of both parties by one decree.⁵

§ 538. Where parties have regulated their rights in water by a contract, it is not the province of equity to construe such contract and determine their rights under it;⁶ but

¹ Pollitt v. Long, 58 Barb. 20.

² Longwood Valley Co. v. Baker, 21 N. J. Eq. 166.

³ Colwell v. May's Landing Co., 19 N. J. Eq. 245.

⁴ Carlisle v. Cooper, 21 N. J. Eq. 576; Longwood Valley Railroad Co. v. Baker, 27 N. J. Eq. 166; Crosby v. Smith, 19 Wis. 449. The wrongful addition of flashboards to a dam rightfully maintained may cause such an injury as to call for an injunction. Knapp v. Douglas Axe Co., 13 All. 1. Unhealthfulness caused by the increased height of a dam may be ground for an injunction. Norwood v. Dickey, 18 Ga. 528.

⁵ Arthur v. Case, 1 Paige, 446; Belknap v. Trimble, 3 Paige, 577; Lehigh Valley Railroad Co. v. Society, 30 N. J. Eq. 145; 32 N. J. Eq. 329; Atlanta Mills v. Mason, 120 Mass. 244. In such cases it is necessary so

to frame the decree as to protect the rights of each, and, unless the injury clearly calls for equitable interference, it is best to leave the parties first to their remedies at law. Hoxsie v. Hoxsie, 38 Mich. 77. If one erects a new mill so close above an existing mill as to suffer from its back flowage, equity will not interfere until he has established his right at law. Van Bergen v. Van Bergen, 3 Johns. Ch. 282.

⁶ Fisk v. Wilber, 7 Barb. 395; Burnham v. Kempton, 44 N. H. 78, 93; Morris Canal Co. v. Society, 1 Halst. Ch. 203. In Mayor v. Commissioners of Spring Garden, 7 Penn. St. 348, where the legislature had granted an exclusive right to the water-power of a navigable stream to the grantors of the plaintiff, and afterwards granted a privilege of taking water from the stream to supply the inhabitants of a district with

where its meaning is clear,¹ or has been adjudicated, equity will restrain the parties from any breach of it, although the acts proposed would not apparently be injurious to the plaintiffs.² Where the act is not clearly a breach, equity will not interfere³ unless serious injury is shown;⁴ but where great changes are proposed, in breach of the rights alleged under the contract, and the meaning of the contract is doubtful, equity will enjoin the parties from making such changes until the rights can be determined at the hearing, or by issue at law.⁵

§ 539. So equity will adjust the respective rights of grantors and grantees of water or riparian property.⁶ Where a riparian owner conveys a portion of his land including a water-power, equity will restrain him from disturbing his grantee in violation of the express terms of his grant without first sending the grantee to a court of law.⁷ So, where under a Mill Act, rights of the parties have been fixed and a jury have found that the dam should be kept open at certain seasons, an injunction will be granted to protect the plaintiff's rights under such finding.⁸

§ 540. Another ground of equity jurisdiction is the regulation of common rights in water. Judge Sargeant says: "Courts of equity have jurisdiction of that class of cases where there is an admitted common right among several owners of the same privilege, to regulate the common use,

water, but not for use as water-power, and it was shown that the taking of the amount necessary to supply the district would have no effect upon the power, the court held that the latter grant was not in derogation of the former, and refused to grant an injunction against the erection of works for taking the water.

¹ *Tipping v. Eckersley*, 2 K. & J. 264; *Olmstead v. Loomis*, 9 N. Y. 423; 6 Barb. 52.

² *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260.

³ *Morris Canal Co. v. Society*, 1 Halst. Ch. 203.

⁴ *Ingram v. Morecraft*, 33 Beav. 40.

⁵ *Johnston v. Hyde*, 25 N. J. Eq. 454.

⁶ *Seneca Woollen Mills v. Tillman*, 2 Barb. Ch. 9; *Crittenden v. Field*, 8 Gray, 621; *Patten v. Marden*, 14 Wis. 473; *Hanna v. Clarke*, 31 Gratt. 36; *Comstock v. Johnson*, 46 N. Y. 615; *Wakely v. Davidson*, 26 N. Y. 387; *Merrill v. Calkins*, 10 Hun, 497.

⁷ *Seneca Woollen Mills v. Tillman*, 2 Barb. Ch. 9.

⁸ *Hill v. Sayles*, 12 Cush. 454.

to determine the extent of their respective rights and the proper mode of exercising and enjoying them, as tending to prevent litigation, and as affording a more complete and perfect remedy than could be obtained at law, and as furnishing, in fact, the only adequate means of ascertaining and determining the respective rights of the parties."¹ The jurisdiction in this class of cases rests on the inadequacy of legal remedies, and the prevention of multiplicity of suits. So the majority of an association have been restrained from letting water run to waste without regard to the interests of the minority;² and where one of several parties having a common interest in a water-power uses more than his share, equity will call all the parties before it, if necessary, determine their respective rights and obligations by one decree, and enjoin those using more than their share from such use.³ Parties who are jointly interested in the use and benefit of a mill or water-power are held liable in equity to a proportional share of the expenditures for the common benefit, necessary for maintaining such mill or power.⁴

¹ *Burnham v. Kempton*, 44 N. H. 78, 100. Where two corporations have conflicting claims under their charters to the use of the waters of the same streams, equity has jurisdiction to settle their relative rights, and for that purpose may enjoin further prosecution of suits at law. *Lehigh Valley Railroad Co. v. Society*, 30 N. J. Eq. 145; 32 N. J. Eq. 329. See, also, *Ranlet v. Cook*, 44 N. H. 512; *Ballou v. Wood*, 8 Cush. 48; *Lyon v. McLaughlin*, 32 Vt. 423; *Sanborn v. Braley*, 47 Vt. 170; *Adams v. Manning*, 48 Conn. 477; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Hanna v. Clarke*, 31 Gratt. 36; *Ballou v. Hopkinton*, 4 Gray, 324; *Bardwell v. Ames*, 22 Pick. 333, 354; *Belknap v. Trimble*, 3 Paige, 377; *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 16 Pick. 512, 526.

² *Ballou v. Wood*, 8 Cush. 48.

³ *Kennedy v. Scovil*, 12 Conn. 317; *Adams v. Manning*, 48 Conn. 477; *May v. Parker*, 12 Pick. 34;

Bliss v. Rice, 17 Pick. 23; *Ballou v. Hopkinton*, 4 Gray, 324; *Hanna v. Clarke*, 31 Gratt. 36. Where several have a right of passage in a private canal, equity will enjoin a party in interest from injuring the canal. *Page v. Young*, 106 Mass. 313. An oral agreement by tenants in common of a dam, giving each other a way over it, will not, though executed, give a good right of way to one co-tenant against a purchaser for value from the other without notice of the agreement, and will not be enforced against him in equity. *Bush v. Golden*, 17 Conn. 594. In *Woodruff v. North Bloomfield Gravel Mining Co.* (U. S. Cir. Ct., 9th circuit), 11 Pacific Coast L. J. 181, it is held that one tenant in common of land injured by a public and private nuisance may sue to enjoin the nuisance without making his co-tenant a party, either as complainant or defendant.

⁴ *Bradfield v. Dewell*, 48 Mich. 9;

§ 541. An injury to health by the obstruction and accumulation of water is ground for injunction.¹ But in States where the law favors the development of mills, it is held that if the injury to health is merely to one family or to a few individuals, the private right must give way to the public convenience, at least so far that equity will not enjoin the accumulation of water, but leave the plaintiffs to their legal remedies.² And an injunction will not be granted, on the application of individuals, to prevent injuries to the public health unless it is alleged in the bill that their health will be directly affected by the nuisance.³

§ 542. In general equity will not interpose to prevent the diversion of subterranean waters by an excavation on the defendant's own land.⁴ This follows from the principles with regard to subterranean waters, which have been stated in a former chapter.⁵ But where such diversion of subterranean water will have the effect of cutting off the supply of a stream in a defined surface channel through other lands, the diversion will be enjoined.⁶ And where subterranean water flows in a defined channel and a known course, equity will protect the rights of property-owners in such stream.⁷ Where a well is supplied by water percolating

Denman v. Prince, 40 Barb. 213; *Clark v. Plummer*, 31 Wis. 442; *Sanborn v. Braley*, 47 Vt. 170; *Carver v. Miller*, 4 Mass. 559; *Buck v. Spofford*, 47 Vt. 170. In several of the States this liability is regulated by statute, proceedings are authorized to determine the necessity and extent of repairs and liens on the property, or, as in Massachusetts, on the profits of business, given to enforce payment. See Mass. Pub. Stats. 1882, c. 190, § 59 *et seq.*; N. H. Rev. Stats. (1878), Title 17, c. 141; Maine Rev. Stats. (1871), Title 4, c. 57; Wisconsin Rev. Stats. (1878), c. 146, § 3403 *et seq.*

¹ *Bell v. Blount*, 4 Hawks (N. C.) 384; *Attorney General v. Hunter*, 1 Dev. Eq. (N. C.) 12; *Ogletree v. McQuaggs*, 67 Ala. 580; *Norwood v.*

Dickey, 18 Ga. 528; *Adams v. Popham*, 76 N. Y. 410.

² *Eason v. Perkins*, 2 Dev. Eq. (N. C.) 38; *Wilder v. Strickland*, 2 Jones Eq. (N. C.) 386; *Fox v. Holcomb*, 32 Mich. 494.

³ *Vail v. Mix*, 74 Ill. 127. See *Adams v. Popham*, 76 N. Y. 410.

⁴ *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Roath v. Driscoll*, 20 Conn. 533; *Ellis v. Duncan*, 21 Barb. 230; *Mosier v. Caldwell*, 7 Nev. 363.

⁵ *Ante*, c. 9.

⁶ *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483.

⁷ *Delhi v. Youmans*, 50 Barb. 316; 45 N. Y. 362; *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 470, 686; *Keeney v. Carilla*, 2 New Mex. 480.

through the earth, the owner of the well is not entitled to the water until it enters his well, and equity will not enjoin the opening and maintenance of a new well which diverts water therefrom.¹ But the occupier of neighboring property will be restrained from collecting rubbish on his property, or using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well.²

§ 543. Under the customs of miners, adopted in the mining States and Territories, and allowing priority of right to the first appropriator of a stream,³ which doctrine has been extended by the courts to appropriations of streams flowing through public lands,⁴ for any beneficial use, an appropriation of such a stream in whole or in part⁵ will be protected by injunction in the enjoyment of that portion of the stream to which he is entitled.⁶ Such right extends to

¹ *Hammond v. Hall*, 10 Sim. 551; *Ellis v. Duncan*, 21 Barb. 230; *Delhi v. Youmans*, 50 Barb. 316; 45 N. Y. 362. See *Acton v. Blundell*, 12 M. & W. 324; and see *ante*, c. 9.

² *Womersley v. Church*, 17 L. T. N. S. 190. It is held in Indiana that equity will not restrain a municipality from establishing a cemetery which will destroy the plaintiff's well. There was some doubt as to the effect of the work proposed, but the court went upon the broad ground that it is "impossible to establish correlative rights in a subterranean stream, the situation of which is not known"; and that the defendant, as owner of land, owns whatever may be found below the surface, and may dig for and apply such articles to his own purposes. *Greencastle v. Hazelett*, 23 Ind. 186.

³ *Irwin v. Phillips*, 5 Cal. 140; *Atchison v. Peterson*, 20 Wall. 507; 1 Mont. 561; *Basey v. Gallagher*, 20 Wall. 670; *Bear River Co. v. York Mining Co.*, 8 Cal. 327; *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *McDonald v. Bear River Co.*, 13 Cal. 220; *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Hill v. Smith*, 27 Cal. 476; *Smith*

v. O'Hara, 43 Cal. 371; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir Mining Co. v. Carpenter*, 4 Nev. 534; *Hobart v. Ford*, 6 Nev. 80; *Proctor v. Jennings*, 6 Nev. 83; *Dalton v. Bowker*, 8 Nev. 201; *Barnes v. Sabron*, 10 Nev. 217; *Columbia Mining Co. v. Holter*, 1 Mon. 296; *Woolman v. Garlinger*, 1 Mon. 535; *Keeney v. Carilla*, 2 New Mex. 480; *Hungarian Hill Co. v. Moses*, 58 Cal. 168; *ante*, c. 7. See Cal. Civ. Code, §§ 1410-1422.

⁴ *Wixon v. Bear River Co.*, 24 Cal. 367; *McDonald v. Askew*, 29 Cal. 201; *Basey v. Gallagher*, 20 Wall. 670; *Ellis v. Tone*, 58 Cal. 289; *ante*, c. 9.

⁵ *Butte Canal Co. v. Vaughan*, 11 Cal. 143; *Keeney v. Carilla*, 2 New Mex. 480; *Farley v. Spring Valley Mining Co.*, 58 Cal. 142.

⁶ *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Ophir Mining Co. v. Carpenter*, 4 Nev. 534; *Hobart v. Ford*, 6 Nev. 80; *Barnes v. Sabron*, 10 Nev. 217; *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, 20 Wall. 670; *Columbia Mining Co. v. Holter*, 1 Mon. 296; *Keeney v. Carilla*, 2 New Mex. 480. So where the plaintiff in excavating a tunnel in a mountain to

subterranean currents of water, which will be protected by injunction.

§ 544. The pollution of a stream or supply of water is another frequent ground for equitable interference.¹ There must be a perceptible pollution, injuring the plaintiff, to justify the granting of an injunction. Where a local board maintaining waterworks on a stream sought to restrain the defendant from polluting the stream by the discharge of sewage eight miles above, on the ground of nuisance, and the evidence showed that there was such pollution at the point of discharge, but that it was wholly imperceptible by chemical analysis at the intake of the waterworks, *Jessel, M. R.*, dismissed the bill.² The injury must be to the plaintiff in his rightful use of the water. Where the plaintiff brought suit to restrain the defendant from discharging muddy water from a gravel-pit into a stream used by the plaintiff in cultivating water-cress beds, *Wood, V. C.*, held that in the absence of a prescriptive right, the defendant had as much right to use the stream for drainage as the plaintiff for growing water-cresses, and

its mining claim, on government lands, struck a subterranean flow of water, and appropriated and used it, and several years afterward the defendants, by another tunnel, intercepted the flow of water and appropriated it to their own use, an injunction was issued restraining the defendants from such diversion. *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 470.

¹ *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; 19 Beav. 485; *Lingwood v. Stowmarket*, L. R. 1 Eq. 77; *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Crossley v. Lightowler*, L. R. 2 Ch. 418; *Clowes v. Staffordshire*, L. R. 8 Ch. 125; *Pennington v. Brinsop*, 5 Ch. D. 769; *Jamieson v. Russel*, 3 Pat. Ap. (Scots.) 403; *ante*, § 214; *Holsman v. Boiling Spring Co.*, 1 Mc-

Carter, 335; *Attorney General v. Steward*, 20 N. J. Eq. 415; 21 N. J. Eq. 340; *Merrifield v. Lombard*, 13 Allen, 16; *Richmond Manuf. Co. v. Atlantic De Laine Co.*, 10 R. I. 106; *Seaman v. Lee*, 10 Hun, 607; *Canfield v. Andrews*, 54 Vt. 1. See *New Boston Coal Co. v. Pottsville Water Co.*, 54 Penn. St. 164; *Woodyear v. Schaefer*, 57 Md. 1; *Woodruff v. North Bloomfield Gravel Mining Company*, 11 Pacific Coast L. J. 181; *Silver Spring Co. v. Wanskuck Co.*, 13 R. I. 611. In the last case it was decided that the change of a community from agricultural to manufacturing does not change the policy of the law, nor the rights of riparian owners to the natural purity of the stream.

² *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. 172. See also *Silver Spring Co. v. Wanskuck Co.*, 13 R. I. 611.

refused the injunction.¹ But where perceptible pollution is shown to the damage of the plaintiff, an injunction will be granted to prevent its continuance,² although the damage may be merely nominal.³ A corruption of water will be enjoined if causing injury to the plaintiff in any rightful use of the water, as by rendering it unfit for manufacturing purposes,⁴ or for domestic uses,⁵ or for the drink of cattle,⁶ or for fish to live in,⁷ or when it impairs the health of those in the community.⁸ So the accumulation of corrupting deposits in a stream,⁹ the pollution of a canal,¹⁰ the discharge into a stream of heated water,¹¹ or of the offal of abattoirs,¹² or of sawdust from a mill,¹³ will be prevented by injunction. And the fact that others also pollute the stream, and that the pollution caused by the defendant is an inconsiderable

¹ *Weeks v. Heward*, 10 W. R. 557.

² *Goldsmid v. Tunbridge*, L. R. 1 Ch. Ap. 349; *Crossley v. Lightowler*, L. R. 2 Ch. Ap. 478; *Bidder v. Croyden*, 6 L. T. N. S. 778; *Manchester v. Workson*, 23 Beav. 198; *Oldaker v. Hunt*, 6 D. G., M. & G. 376; *Attorney General v. Birmingham*, 4 K. & J. 528; *Attorney General v. Sutton*, 2 Jur. N. S. 180; *Pennington v. Brinsop*, L. R. 5 Ch. D. 769.

³ *Crossley v. Lightowler*, L. R. 2 Ch. Ap. 478; *Attorney General v. Leeds*, L. R. 5 Ch. Ap. 583, 589 (*per James, V. C.*, in note); *Clowes v. Staffordshire*, L. R. 8 Ch. Ap. 125; *Pennington v. Brinsop*, L. R. 5 Ch. D. 769. See *Coulson & Forbes on Waters*, 669.

⁴ *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Tipping v. Eckersley*, 2 K. & J. 264; *Crossley v. Lightowler*, L. R. 2 Ch. Ap. 478; *Clowes v. Staffordshire*, L. R. 8 Ch. Ap. 125; *Pennington v. Brinsop*, L. R. 5 Ch. D. 769; *Merrifield v. Lombard*, 13 All. 16.

⁵ *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Attorney General v. Cockermouth Board*, L. R. 18 Eq. 172; *Holsman v. Boiling Spring Co.*, 1 McCarter, 335; *Attorney General v. Steward*, 20 N. J. Eq. 415;

Baltimore v. Warren Manuf. Co. (Md.), 27 Alb. L. J. 387.

⁶ *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; 19 Beav. 485; *Attorney General v. Birmingham*, 4 K. & J. 528; *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180.

⁷ *Oldaker v. Hunt*, 6 De Gex, M. & G. 376; 19 Beav. 485; *Bidder v. Croydon*, 6 L. T. N. S. 778; *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180; *Attorney General v. Birmingham*, 4 K. & J. 8; *Seaman v. Lee*, 10 Hun, 607.

⁸ *Ante*, § 220.

⁹ *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Attorney General v. Luton Local Board*, 2 Jur. N. S. 180; *Hudson River Railroad Co. v. Loeb*, 7 Rob. (N. Y.) 418.

¹⁰ *Attorney General v. Basingstoke*, 45 L. J. Ch. 726; *Boston Rolling Mill v. Cambridge*, 117 Mass. 396.

¹¹ *Tipping v. Eckersley*, 2 K. & J. 264. For recovery at law for discharging heated water into a stream, see *Mason v. Hill*, 5 B. & Ad. 1.

¹² *Attorney General v. Steward*, 20 N. J. Eq. 415; 21 N. J. Eq. 340; *Babcock v. New Jersey Stockyard Co.*, 20 N. J. Eq. 296; *Woodyear v. Schaefer*, 57 Md. 1.

¹³ *Canfield v. Andrews*, 54 Vt. 1.

part of the whole corruption, is no bar to an injunction.¹ If the defendant has a right to discharge corrupting matter into the stream to a certain extent, he may be enjoined from polluting the stream beyond his right; but the plaintiff of course must show that there has been such an increase.² The same rules apply to the corruption of navigable or tidal waters as to private streams.³

§ 545. The pollution of streams by municipalities and public bodies in charge of sewage and drainage has occasioned frequent exercise of the preventive powers of equity. Upon principle a public body has no more right at common law than a private person. Its duty to prevent public nuisances by taking care of the sewage or drainage of a district gives it no right to create another nuisance by the pollution of a stream.⁴ If special powers have been granted to it by statute for the performance of a given object, it is bound to act strictly within its powers.⁵ If it exercises such powers so as to injure the property of individuals, it is responsible for the injury as a tort, unless the act done was strictly necessary for the performance of the objects for which the powers were granted; and in such case the remedy of the individual is under the compensation clauses of the Act,⁶ or, in America, usually under the provisions for exercising the power of eminent domain.⁷ Any pollution of a stream by a public body, in taking care of sewage, is therefore a nuisance unless expressly authorized, and is liable to injunction.⁸

¹ Pennington v. Brinsop, L. R. 5 Ch. D. 769.

² Baxendale v. McMurray, L. R. 2 Ch. 790; Attorney General v. Leeds, L. R. 5 Ch. 583; Holt v. Rochdale, L. R. 10 Eq. 354; Metropolitan Board v. London Railway Co., 17 Ch. 246; Attorney General v. Acton Board, 22 Ch. D. 221.

³ Attorney General v. Kingston, 34 L. J. Ch. 481, 486.

⁴ Dillon, Mun. Corp. (3d ed.), § 1048.

⁵ Attorney General v. Colney Hatch Asylum, L. R. 4 Ch. 146. Belknap v.

Belknap, 2 Johns. Ch. 463. See Cowell v. Martin, 43 Cal. 605.

⁶ Ibid.

⁷ Martin, *ex parte*, 13 Ark. 198. See Fleming's Appeal, 65 Penn. St. 444; Boston Rolling Mills v. Cambridge, 117 Mass. 396.

⁸ Goldsmid v. Tunbridge Wells, L. R. 1 Ch. 349; L. R. 1 Eq. 161; Attorney General v. Richmond, L. R. 2 Eq. 306; Attorney General v. Colney Hatch Asylum, L. R. 4 Ch. 146; Attorney General v. Leeds, L. R. 5 Ch. 583; Holt v. Rochdale, L. R. 10 Eq. 354; Attorney General v. Cockermouth

§ 546. An authority over sewage is no authority to commit a nuisance.¹ An owner of land upon a stream below a city is entitled to an injunction against injury by the outflow of sewage.² So an injunction will lie to prevent the opening of additional sewers into a stream in such a manner as to render the water unfit for use.³ And if a few house-holders upon a stream have used it as a drain, a modern board cannot found a prescriptive right to corrupt the stream upon such usage.⁴ If any nuisance of this kind be shown, though causing inconsiderable damage, equity will enjoin its continuance.⁵ In deciding upon the right of a proprietor to an injunction against such a nuisance the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the use of a system of sewers is immaterial where the rights of an individual are invaded. The inconvenience is one of the public's own creation, and should be borne by it rather than the individual.⁶ But where the nuisance is public, an individual is not entitled to an injunction unless he shows a substantial injury to himself.⁷ An injunction will be granted to prevent a local board from polluting

Board, L. R. 18 Eq. 172; Attorney General v. Hackney Board, L. R. 20 Eq. 626; Metropolitan Board v. London Railway Co., 17 Ch. D. 246; Attorney General v. Acton Board, 22 Ch. D. 221; Attorney General v. Luton Local Board, 2 Jur. n. s. 180; Bidder v. Croydon Board, 6 L. T. N. s. 778; Attorney General v. Kingston, 34 L. J. Ch. 481; Attorney General v. Halifax, 39 L. J. Ch. 129; Attorney General v. Basingstoke, 45 L. J. Ch. 726; Oldaker v. Hunt, 6 De Gex, M. & G. 376; 19 Beav. 485; Manchester v. Workson Board, 23 Beav. 198; Attorney General v. Birmingham, 4 K. & J. 528; Attorney General v. Public Board, 1 H. & M. 298; Belknap v. Belknap, 2 Johns. Ch. 463; Woodruff v. Fisher, 17 Barb. 224; Haskell v. New Bedford, 108 Mass. 208; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Columbus v. Woollen Mills Co., 33 Ind. 435.

¹ Attorney General v. Leeds, L. R. 5 Ch. 583; Attorney General v. Hackney Board, L. R. 20 Eq. 626. Same point in case at law. Cator v. Lewisham Board, 5 B. & S. 115.

² Oldaker v. Hunt, 6 De Gex, M. & G. 376; Attorney General v. Leeds, L. R. 5 Ch. 583.

³ Attorney General v. Birmingham, 4 K. & J. 528; Metropolitan Road v. London Railroad Co., 17 Ch. D. 246; Attorney General v. Acton Board, 22 Ch. D. 221; Holt v. Rochdale, L. R. 10 Eq. 354.

⁴ Attorney General v. Luton Board, 2 Jur. n. s. 180.

⁵ Goldsmid v. Tunbridge Wells, L. R. 1 Ch. 349; L. R. 1 Eq. 161.

⁶ Attorney General v. Birmingham, 4 K. & J. 528.

⁷ Lillywhite v. Trimmer, 15 W. R. 763; Attorney General v. Gee, L. R. 10 Eq. 131.

surface-water flowing by an open gutter into a canal and supplying it with water, by first diverting it into a sewer and discharging sewage into the canal.¹ So a city council will be restrained from discharging sewage into a private canal.² Where a discharge of sewage into a stream has been continued for several years, but in quantities not producing perceptible injury, and is afterwards increased so as to cause serious injury, a party applying for an injunction against such increase will not be held guilty of laches.³ Where a city made a contract with the proprietor of land to enlarge a ditch through his premises, so as to provide for carrying off the drainage of the city, and performed its part of the contract in good faith, and was not shown to be guilty of any serious fault or neglect, an injunction was granted to restrain the owner from filling in the ditch and obstructing the flowage.⁴

§ 547. Remedies for injuries to navigation are treated in that part of this work devoted to public waters.⁵ It may be remarked here, that where such a nuisance causes, or is about to cause, special injury to an individual, he is entitled to an injunction against its creation or continuance as a private nuisance, but that such special injury must be clearly shown, to warrant the interference of the court at his suit.⁶ So an

¹ *Manchester v. Worksope Board*, 23 Beav. 198.

² *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

³ *Attorney General v. Luton Local Board*, 2 Jur. n. s. 180; *Goldsmid v. Tunbridge Wells*, L. R. 1 Ch. 349; L. R. 1 Eq. 161; *Metropolitan Board v. London & N. W. Ry. Co.*, L. R. 17 Ch. D. 246; *Attorney General v. Acton Board*, L. R. 22 Ch. D. 221; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

⁴ *Coldwater v. Tucker*, 36 Mich. 474.

⁵ *Ante*, §§ 121-128.

⁶ *Crowder v. Tinkler*, 19 Ves. 617; *Spencer v. London Railway Co.*, 8 Sim. 193; *Attorney General v. Lonsdale*, L. R. 7 Eq. 377; *Georgetown v.*

Alexandria Canal Co., 12 Pet. 91; *Mississippi Railroad Co. v. Ward*, 2 Black, 485; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Penniman v. New York Balance Dock Co.*, 3 How. Pr. 40; *Hecker v. New York Balance Dock Co.*, 13 How. Pr. 549; *Hudson River Railroad Co. v. Loeb*, 7 Rob. (N. Y.) 418; *Gillespie v. Forrest*, 18 Hun, 110; *Maryland Railroad Co. v. Stump*, 8 Gill & J. 479; *Frink v. Lawrence*, 20 Conn. 117; *Thornton v. Grant*, 10 R. I. 477; *Hickok v. Hine*, 23 Ohio St. 523; *Cowell v. Martin*, 43 Cal. 605; *Parrish v. Stephens*, 1 Oregon, 73; *Parker v. Taylor*, 7 Oregon, 435; *Musser v. Hershey*, 42 Iowa, 356; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *Cotton v. Mississippi Boom*

interference with one's private right of access to a body of water from his own land, or by a particular wharf, will be enjoined at his private suit.¹ An obstruction or injury to the navigation of a private canal will be restrained at the suit of the parties injured thereby.²

§ 548. Other instances of injuries affecting waters, in which injunctions have been granted are: against the flooding of another's mine by permitting a communication between the mines to remain open;³ preventing a person from exercising his right to enter upon the lands of the defendant to repair his dam or works erected for the use of water;⁴ the erection of a railway bed in and upon an artificial basin, diminishing its capacity;⁵ maintaining a boom which drives

Co., 19 Minn. 497. See *Morris & Essex Railroad Co. v. Prudden*, 20 N. J. Eq. 530.

¹ *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713; *Cowell v. Martin*, 43 Cal. 605; *Parker v. Taylor*, 7 Oregon, 435. See *Thornton v. Grant*, 10 R. I. 477. As to injuries to such right by the public in the construction of public works, see *Attorney General v. Conservators of the Thames*, 1 H. & M. 1, 31; *Macey v. Metropolitan Board*, 33 L. J. Ch. 379; *Sutton Harbor Improvement Co. v. Hitchins*, 21 L. J. Ch. 73.

² *London Railway Co. v. Grand Junction Canal Co.*, 1 Railway & Cas. 224. In States where streams having only capacity to float logs to market at certain seasons of the year are not considered navigable, the diversion of water from such streams will not be enjoined as an injury to navigation. *Hubbard v. Bell*, 54 Ill. 110. The Illinois courts followed the early New York doctrine. *Munson v. Hungerford*, 6 Barb. 265. So the owner of a dam on such a stream was held entitled to an injunction against injury by the rafting of logs over it. *Curtis v. Keeler*, 14 Barb. 511. The New York rule was modified in *Morgan v. King*,

18 Barb. 277; 30 Barb. 9. The stricter rule as to right of navigation was favored in the same case, 35 N. Y. 454; and *Pierrepoint v. Lovell*, 4 Hun, 696. But in *Pierrepoint v. Lovell*, 72 N. Y. 211, the latter decision was reversed, and the rule that streams capable of floating logs at certain seasons will be protected as navigable for such purposes, adopted. For other cases recognizing the right of navigation in such streams, see *ante*, § 107; *Rowe v. Titus*, 1 Allen (N. B.) 326; *Essen v. McMaster*, 1 Kerr (N. B.) 501; *McLaren v. Caldwell*, 6 Tupper's App. Rep. (Canada) 456. On a bill for an injunction by a mill-owner to protect his dam from injuries by floods, and jams of logs caused by the defendant's booms, *Cooley, J.*, held, in dismissing the bill without prejudice, that the parties' rights mutually modified each other, and that, while the exercise of each might render the other less valuable, there was no ground for complaint, if the use was reasonable. *Buchanan v. Grand River Log Co.*, 48 Mich. 364.

³ *Mexborough v. Bower*, 7 Beav. 127.

⁴ *McSwiney v. Haynes*, 1 Ir. Eq. (1839), 322.

⁵ *Boston Water Power Co. v. Boston Railroad Co.*, 16 Pick. 572. For

logs upon another's land;¹ interference with an exclusive right to supply a town with water;² the holding of a regatta upon a lake, and thereby injuring an exclusive right of fishery;³ the diminution of the volume of a stream by pumping out large quantities of water for mechanical purposes;⁴ the building of a dike along the bank of a stream in such a way as to throw the water in unnatural quantities upon the lands on the other side, and injure them;⁵ and the destruction of a dam and works, where the plaintiff's right to maintain them is clear.⁶

§ 549. The abatement, as a nuisance, of works authorized by law, or whose character as a nuisance is not clear, will be enjoined until the character of the structure is ascertained, and if it be decided to be lawful, a perpetual injunction will issue.⁷ So the abatement, as a nuisance to navigation, of a dam maintained as by right, will be restrained until the right can be determined, where great loss to the owner and inconvenience to the public would be occasioned by its destruction.⁸ So equity will prevent the abatement of an alleged nuisance by an unreasonable method, or one causing needless damage. So, where a municipal body attempted to fill up a canal which was a public highway, because it had become unwholesome, such action was restrained by an injunction at the instance of an owner of property abutting thereon.⁹

cases at law upon the same point, see *Beeston v. Wheate*, 5 E. & B. 986; *Peter v. Daniel*, 5 C. B. 568; *Frailey v. Waters*, 7 Penn. St. 221.

¹ *Cotton v. Mississippi Boom Co.*, 19 Minn. 497.

² *Whitchurch v. Hide*, 2 Atk. 391.

³ *Bostock v. North Staffordshire Railway Co.*, 5 De Gex & Sm. 584.

⁴ *Attorney General v. Great Eastern Railway Co.*, L. R. 6 Ch. 572.

⁵ *Burwell v. Hobson*, 12 Gratt. 322.

⁶ *Great Falls Manuf. Co. v. Worster*, 23 N. H. 462; *Morris Canal Co. v. Society*, 1 Hal. Ch. 203.

⁷ *Lehigh Valley Railroad Co. v. McFarlan*, 31 N. J. Eq. 706; 30 N. J.

Eq. 180. In this case a company authorized to maintain a canal and take property therefor had maintained a dam for many years as a part of their works. They increased its height by flash-boards. The defendant, who was injured by backflowage caused by the increased height, removed the flash-boards. It was held that his only remedy was by an action for damages, and he was enjoined from interfering with the dam in future.

⁸ *Crenshaw v. Slate River Co.*, 6 Rand. 245.

⁹ *Clark v. Syracuse*, 13 Barb. 32; *Babcock v. Buffalo*, 1 Sheld. (N. Y.

§ 550. The plaintiff's equitable right to an injunction must appear on the face of the bill, or it will be held bad on demurrer.¹ The jurisdiction of the court must also be shown where the court is not of general jurisdiction, or the bill will be demurrable.² But the pendency of an action at law by the plaintiff is no reason why equity will not grant an injunction. And the court will not withhold its hand on account of the pendency of an appeal at law from the decision establishing the legal right, unless it doubts the correctness of the decision,³ but the pendency of the appeal may influence the court in determining the date at which the injunction should take effect.⁴ Generally the court will not grant an injunction seriously affecting the rights of persons not before the court.⁵ But we have seen that in such a case it may call the persons to be affected before it.⁶ And where a person undertakes the prosecution or defence of a case, as where a landlord assumes the defence of a bill against his tenant, he is within the jurisdiction of the court, and may be included in the terms of the decree.⁷

§ 551. Where a preliminary injunction has been granted upon the filing of the bill, it is always open to a motion to

Sup. Ct.) 317; 56 N. Y. 268. See *Finley v. Hershey*, 41 Iowa, 389.

¹ *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

² *May v. Parker*, 12 Pick. 34.

³ *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71. But equity may decline to exercise jurisdiction where actions at law are pending, and the effect of taking jurisdiction would be to produce, and not to prevent, multiplicity of suits. In *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71, the court said: The plaintiffs "bring forth their two suits at law, and no final judgment is obtained in either of them. They then bring their bill in equity, and ask this court for the writ of injunction, and among other things, for damages, since the last or second suit at law. We approve of

the plaintiffs' prosecuting one of these suits at law to final judgment, so that their legal right be fully established, and they have doubtless the right to resort to another suit at law. But when a party brings forth his two suits at law before he appeals to the equitable tribunal, we think the presumption may be fairly entertained that he has elected a favorite remedy, and must abide by it, and should not ask for equity while inflicting a multiplicity of suits at law upon his opponents."

⁴ *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71.

⁵ *Hartlepool Gas Co. v. West Hartlepool Harbor Co.*, L. J. N. S. 366.

⁶ *Adams v. Manning*, 48 Conn. 477.

⁷ *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71.

dissolve before the coming in of the answer;¹ and sometimes provision will be made in the preliminary order for hearing such a motion.² Where the preliminary injunction appears to have been granted in a case perfectly remediable at law, it will be dissolved.³ But a partial removal of the nuisance before the injunction issues will not deprive the plaintiff of his right where the existence and continuance of an injury in the past is shown.⁴

§ 552. In form the injunction may be either prohibitory or mandatory. The power to issue a mandatory injunction was formerly doubted; and resort was had to prohibitory circumlocutions.⁵ Thus Lord Eldon refused to order repairs to be made to a canal, but granted an injunction restraining the defendant from impeding the use of the canal by continuing to keep it or its works out of repair.⁶ Where the injunction requires a positive act on the part of the defendant, it is called a mandatory injunction, although expressed in negative terms.⁷ But the power to issue a mandatory injunction is completely established, and has been frequently exercised in cases affecting waters.⁸ It has also been questioned

¹ 2 Dan. Ch. Prac. (5th ed.), 1675; *Wing v. Fairhaven*, 8 Cush. 353.

² *Binney's Case*, 2 Bland Ch. 99.

³ *Wing v. Fairhaven*, 8 Cush. 363; *Wheeler v. State*, 50 Ga. 34; *Philips v. Stocket*, 1 Tenn. 200.

⁴ *Carlisle v. Cooper*, 21 N. J. Eq. 576.

⁵ *Anon.* 1 Ves. Jr. 140; *Robinson v. Byron*, 1 Bro. C. C. 588; *Blake-more v. Glamorganshire Canal Co.*, 1 Myl. & K. 154; *Spokes v. Banbury Board*, L. R. 1 Eq. 42; *Mexborough v. Bower*, 7 Beav. 127.

⁶ *Lane v. Newdigate*, 10 Ves. 192. See *Murdock's Case*, 2 Bland Ch. 470, 471.

⁷ *Kerr on Injunctions*, 50. See *Carlisle v. Stevenson*, 3 Md. Ch. 499.

⁸ *Harrop v. Hirst*, as cited in 1 *Seton on Decrees* (4th ed.), 213; *Attorney General v. Metropolitan Board*,

1 H. & M. 298, 312; *Manchester v. Worksope Board*, 23 Beav. 198, 209; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; *Buck Mountain Coal Co. v. Lehigh Coal Co.*, 50 Penn. St. 91; *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311; 34 Barb. 485; *Foot v. Bronson*, 4 Lans. 47; *Shannon v. Wisconsin*, 18 Wis. 604; *Carlisle v. Cooper*, 21 N. J. Eq. 576. In *Blake-more v. Glamorganshire Canal*, 1 Myl. & K. 154, 184, Lord Bougham, in speaking of the form of the order in *Lane v. Newdigate*, said: "I take leave to agree with Lord Lyndhurst in the opinion that if the court has this jurisdiction, it would be better to exercise it directly, and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction."

whether a mandatory injunction may be granted preliminarily or upon interlocutory motion,¹ but it is settled that the court has power to grant such orders at any stage of the proceedings, subject to the limitation that before the hearing it is to be exercised with great caution and only in case of extreme necessity.²

¹ Audenreid *v.* Philadelphia Railroad Co., 68 Penn. St. 370.

² Westminster Brymbo Coal & Coke Co. *v.* Clayton, 36 L. J. Ch. 476. In the case of *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawyer, 470, 482, where the defendant had tapped a subterranean stream of water to which the plaintiff had a prior right, Sawyer, J., said: "It is shown, and this does not seem to be seriously controverted, that the water can be restored by building a water-tight wall or bulkhead across the tunnel at a point indicated. But it is urged that the injury has been committed, and that this being so, the court will not, on motion for a preliminary injunction, issue a mandatory writ, affirmatively commanding the performance of an act such as to fill up a tunnel, rebuild a wall that has been demolished, and the like; and so the authorities seem to be. But, while this seems to be an established rule, it also appears to be well established that the result sought may be accomplished by an order merely restrictive in form." After citing several cases, principally those cited above, he proceeded: "Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up or build a water-tight barrier across the tunnel to accomplish the end sought." In the same case, p. 685, on a motion to dissolve, Field, J., expressed his opinion to the same effect. After reviewing the authorities, he said: "Other cases to the same purport might be cited,

but these are sufficient, I think, to show that a court of equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to obey it, to do substantive acts . . . Undoubtedly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with it, but, in some cases, the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the court is needed—to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree." In *Longwood Valley Railroad Co. v. Baker*, 27 N. J. Eq. 166, 170, an injunction was granted to restrain mill-owners from overflowing lands condemned for a railway, and preventing the laying of a track over it. Chancellor Runyon said: "The Messrs. Baker object also that the injunction is mandatory, and that, inasmuch as the addition had been made to the dam when the bill was filed, such an injunction is contrary to the established practice of the court. The objection cannot be sustained. The injunction is against causing the water to rise any higher than it was accus-

§ 553. Where the wrongful diversion of water has been completed before the filing of the bill, equity will compel the restoration of the stream to its natural channel by a mandatory injunction.¹ And where the defendants, in relieving their lands from surface-water, deepened a ditch upon the highway, and thus caused an increased and unnatural flow of water through the surface-drains of adjacent owners, causing injury to their lands, and making further injuries probable, a mandatory injunction was issued directing the defendants to fill up the ditch.² In *Carlisle v. Cooper*³ the decree authorized the maintenance of a dam at a certain height, with the addition of movable gates in ordinary stages of water, subject to the obligation in times of freshets or high water, so as to raise the said gates, that the surface of the water should not be raised above a line twelve and a quarter inches above the top of the mud-sill upon the permanent dam, and directed the abatement of the dam to such limits. The court above, in approving this decree, said: "The decree, by its reference to the cap-piece as fixing the extreme height to which the water may be raised by the use of the gates when shut, is probably more specific in its direction than usual; but it removes all uncertainty in the adjudication of the court as to the extent of the rights of the respective parties." So an injunction will be granted restraining the defendant from preventing the plaintiff from repairing the banks of a stream, and from entering on the defendant's land for that purpose, if necessary.⁴

tomed to rise on the day designated. The injury was a continuing injury from day to day. The mill-owners were not required to reduce their dam, but to refrain from raising the water beyond a certain height. Besides, if the injunction were regarded as strictly mandatory, that would not constitute a valid objection to it. There is no general rule against granting such relief interlocutorily, where the damage has been completed before the filing of the bill, and there is no difference between the case of injury to easements and

injury to other rights. The court will not, however, interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief, and each case must depend on its own circumstances." See, also, *Durell v. Pritchard* (obstruction of light), L. R. 1 Ch. 244.

¹ *Corning v. Troy Iron Factory*, 40 N. Y. 191; 39 Barb. 311; 34 Barb. 485.

² *Foot v. Bronson*, 4 Lans. 47.

³ 21 N. J. Eq. 576, 598.

⁴ In *McSwiney v. Haynes*, 1 Ir. Eq. 322, where a stream broke through its

§ 554. The court will not consider an application for a mandatory injunction where the plaintiff has been guilty of any delay in asking its aid. It will not undo what the plaintiff might have prevented by filing his bill promptly.¹ In deciding upon an application, the court will consider the inconvenience likely to be caused. Where an order was asked against a local board to close up certain sewers, it was refused on the grounds of inconvenience, and of a doubt as to the powers of the board.²

§ 555. Equity has jurisdiction to decree the abatement of a nuisance as well as to prevent its erection or continuance.³ Such a decree is a mandatory injunction in nature, for equity jurisdiction is properly *in personam* and not *in rem*, and the order is primarily directed to the defendant.⁴

bank upon the land of the defendant and began to change its channel, threatening irreparable injury to the plaintiff, such an injunction was granted before the coming in of the answer.

¹ Wicks v. Hunt, Johns. 372; Ward v. Higgs, 12 W. R. 1074.

² Attorney General v. Acton Board, 22 Ch. D. 221.

³ Lamborn v. Covington, 2 Md. Ch. 409; Earl v. De Hart, 1 Beas. Ch. 280; Attorney General v. New Jersey Railroad Co., 2 Green Ch. 136; Mann v. Wilkinson, 2 Sumner, 272, 273; Pennsylvania v. Wheeling Bridge, 13 How. 518, 557; Hammond v. Fuller, 1 Paige, 197. See Van Bergen v. Van Bergen, 2 Johns. Ch. 272; 3 Johns. Ch. 282; Stone v. Peckham, 12 R. I. 27, 30; Philips v. Stocket, 1 Tenn. 200; Burwell v. Hobson, 12 Gratt. 322; Ackerman v. Horicon Iron Co., 16 Wis. 150. See Shannon v. Wisconsin, 18 Wis. 604; Eastman v. St. Anthony Water Power Co., 12 Minn. 137; Ames v. Cannon River Manuf. Co., 27 Minn. 245; Brown v. Carolina Central Railway Co., 83 N. C. 128; Raleigh Co. v. Wicker, 74 N. C. 220. A cove-

nant not to maintain a dam at a particular place is not against public policy, and will be enforced in equity by a decree to abate a dam built in violation thereof. Ulrich v. Hull, 17 Wis. 424.

⁴ See cases above cited. In some jurisdictions, either by statute or by judicial legislation, the practice is established of directing the order to the officer of the court in the first instance. Ames v. Cannon River Manuf. Co., 27 Minn. 245. But the power of equity was not so exercised originally. East India Co. v. Vincent, 2 Atk. 83 (abatement of a wall). To same effect, see Campbell v. State, 16 Ala. 144; Barclay v. Commonwealth, 25 Penn. St. 503. These are cases of indictments. The power to abate a nuisance is generally lodged by statute with the common-law courts in their criminal jurisdiction. We have noticed (*ante*, § 400) that an equitable action is maintainable in New York in the Supreme Court by any person specially injured by a nuisance, in which judgment will be granted, directing the removal or abatement of the nuisance. Knox v.

§ 556. In exercising this power, equity will not compel the destruction of valuable property, except in a clear case of necessity. The Supreme Court of Michigan, in reversing an order for the removal of a dam, said (*per* Graves, J.): "Property is not to be destroyed until its destruction is lawfully ascertained to be necessary in order to stop the nuisance, and then no other and no more is to be destroyed than is thus determined to be needful to effect that object."¹

Mayor, 55 Barb. 404; s. c. 38 How. 67; *Delaney v. Blizzard*, 7 Hun, 7; *Van Brunt v. Ahearn*, 13 Hun, 388. The action in *Delaney v. Blizzard* is described as brought "to enjoin the defendant from maintaining a permanent float in front of plaintiff's premises," which would be a simple injunction. In the Massachusetts statutes of 1828, c. 137, § 6, it was provided that where judgment should be rendered in an action on the case for a nuisance, "the court may, on motion of the plaintiff, in addition to the common execution for damages and costs, award and issue a warrant to the sheriff or his deputy to abate and remove the nuisance." In *Bemis v. Clark*, 11 Pick. 452, this statute was held to leave it within the discretion of the court whether to issue the warrant on such motion or not. *Bemis v. Upham*, 13 Pick. 169; *Codman v. Evans*, 7 Allen, 431. This provision is retained by Mass. Pub. Sts., 1882, c. 180, § 1. By § 3 of this chapter, the plaintiff is entitled to abatement as of right in a second suit. See Wis. Rev. Stats., 1878, c. 137, for a similar jurisdiction at law, which abrogated the remedy by abatement in equity. But by St. 1882, c. 190, the equitable jurisdiction to abate in certain cases was restored. *Denner v. Chicago Co.*, 15 N. W. Rep. 158. Courts at law have a similar power in Oregon. Gen. Laws, 1872, § 330, p. 179. *Marsh v. Tullinger*, 6 Oregon, 356. For a similar exercise of power in California, see *Blood v. Light*, 31 Cal. 115.

¹ *Shepard v. People*, 40 Mich. 487; *Smidt v. People*, 46 Mich. 437 (on an information); *Hill v. Sayles*, 12 Cush. 454; *Stone v. Peckham*, 12 R. I. 27. In this case the court was asked to order the removal of a dam which was also used as a highway, and the restoration of a former highway upon which it infringed. The court said: "From the dam as now used the public receives no detriment. On the contrary, we have no doubt that the new road formed by the dam is decidedly superior to the old which has been displaced by it. The removal would be an injury to the public; for it would not only subject the public to the attendant inconveniences, but it would also give a worse road. The plaintiffs are entitled to relief only in so far as they are *individually* injured. We think, therefore, that we shall go far enough in this respect, if we require the defendant to widen the aperture in his dam so as to permit the full flow of the river, and thus relieve the land and pass-way from inundation. We will grant the plaintiffs relief to that extent." So, where a stopping of the wrongful use of a structure will accomplish the object, the order will be limited to that, and not direct a removal of the structure. *Barclay v. Commonwealth*, 25 Penn. St. 503 (a case of indictment). So a judgment that a dam abate is improper where the court finds that, at the time of the trial, the dam was a lawful structure. *Durning v. Burkhardt*, 34 Wis. 585.

Where the injury, present and threatened, is caused by the use of flash-boards, the court may command the removal of the flash-boards already placed upon the dam, and enjoin the defendant against their future use.¹

§ 557. The injunction itself must be in clear and definite terms, which will impose a specific prohibition or command upon the defendant. Generally equity will not command the defendant so to use his own rights as not to injure the plaintiff. That duty is already prescribed by the law of the land. The object of equitable interference is to protect parties from specific infringements of their rights. Where an injunction was asked to restrain the defendant from using a steam engine in pumping and draining water into a river, "so as in any manner to injure the banks of said river, or to injure or interfere with the draining" of other lands, Lord Brougham said: "What purpose then could such an injunction serve as the second alternative of the motion describes? It would give no information; it would prescribe no rule or limits to the defendants; it could not in any manner of way be a guide to them if it did not operate as a snare. It would in reality amount to nothing more than a warning, that if they did anything which they ought not to do, they would be punished by the court; but it would leave to themselves to discover what was forbidden and what allowed." ²

¹ Knapp v. Douglas Axe Co., 13 Allen, 1.

² Ripon v. Hobart, 3 Myl. & K. 169, 173. See, also, Bradfield v. Dewell, 48 Mich. 9; Coalter v. Hunter, 4 Rand. 58, 67; Baltimore v. Appold, 42 Md. 442, 458; Olmstead v. Loomis, 6 Barb. 152; 9 N. Y. 423. In this case, at the Supreme Court, the injunction was denied because of the indefiniteness of the injury to be prohibited. But it was overruled on appeal. Parker, J., said: "If it is established that a long-enjoyed right of the plaintiff's has been improperly interfered with by the defendants, it is no objection to entertaining jurisdiction of the case that there is an uncertainty as to the

measure of right, or as to the precise language in which to describe it intelligibly in an injunction; *id certum est quod certum reddi potest*; and if it were necessary, this case might now be sent to a referee to ascertain and report, after a scientific examination, the precise quantity of water requisite for the use of a forge, such as Wales (the plaintiff) had, and two blacksmith's bellows. But I think in this case such a reference is unnecessary." For cases where a general order will be issued, with leave to the plaintiff to apply for further order, see remarks of Kindersley, V. C., in Hartlepool Gas Co. v. West Hartlepool Harbor Co., 12 L. T. N. S. 306, cited *ante*, § 530, note 2.

§ 558. The court will not refuse to grant an injunction on account of the difficulty in so framing it as to protect the respective rights of the parties, unless the difficulty is caused by uncertainty as to the rights themselves.¹ In *Patten v. Marden*,² a case in which the court was called on to adjust the rights of a grantor and grantee under a deed conveying a portion of a water-power, Cole, J., said: "But however difficult it might be to frame an injunction to meet the emergency of the case, still if the complaint set forth a state of facts calling for the interposition of a court of equity, we are clearly of opinion that an injunction should be granted to protect the rights of the appellant from violation and invasion." In cases where the injury is continued, but not great at any time, the writ or order should contain the words "to the injury of the plaintiff," to prevent the authority of the court being invoked for trivial reasons.³

§ 559. Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may cause him.⁴ The possibility that another nuisance will result from obeying the injunction is no ground for not obeying it.⁵ Where compliance with the decree will involve difficulty and expense, the court will usually suspend its operation for a time so as to save the defendant from needless loss.⁶ But the plaintiffs' rights will never be abridged for this purpose.

¹ *Olmstead v. Loomis*, 9 N. Y. 423, 434; *Patten v. Marden*, 14 Wis. 473.

² 14 Wis. 473.

³ *Lingwood v. Stowmarket*, L. R. 1 Eq. 77; *Elwell v. Crowther*, 31 Beav. 163, 171. In *Baltimore v. Appold*, 42 Md. 442, the court held that an injunction merely forbidding user to the plaintiff's damage would be insufficient

for the plaintiff's protection, because he would be entitled to an action without damage, and to an injunction to save repeated actions.

⁴ *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 146.

⁵ *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71.

⁶ *Attorney General v. Birmingham*,

§ 560. Where an injunction to restrain a local board of health from polluting a stream with sewage was suspended for a time, and on the expiration of the time the board failed to comply with the order, alleging that they had not yet found a means of deodorizing the sewage, they were held guilty of wilful contempt, and an order of sequestration was issued.¹ Where time is given for compliance, the court may require an undertaking from the defendants as to their future conduct, and retain the bill, giving the plaintiff leave to apply for a further order at any time.² Such an undertaking is in effect equivalent to an injunction, and will be enforced by the court.³ But where the plaintiff does not make out his right to an injunction on the existing state of facts, equity will not retain the bill, and give him leave to apply, in the absence of special reasons for such a course.⁴

§ 561. An account of damages resulting from the injury in the past may be ordered, and payment of the amount found due decreed as incidental to the principal object of the bill;⁵ but damages will seldom be granted in lieu of an

¹ 4 K. & J. 528, 548; *Attorney General v. Halifax*, 39 L. J. Ch. 129; *Attorney General v. Bradford Canal*, L. R. 2 Eq. 71; *Attorney General v. Colney Hatch Asylum*, L. R. 4 Ch. 161; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Manchester v. Workson Board*, 23 Beav. 198; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; 1 *Seton on Decrees* (4th ed.), 213. In *Attorney General v. Halifax*, 39 L. J. Ch. 129, a municipality was allowed one year in which to comply with an order for the alteration of sewers.

² *Spokes v. Banbury Board*, L. R. 1 Eq. 42. See *Coulson & Forbes on Waters*, 668. The fact that a complete and literal compliance with an injunction would altogether stop the defendants from working, is not an excuse from such non-compliance; a grave inconvenience of such a kind is proper ground for moving the court to modify such injunction, and such motion may be made by a defendant

in contempt for disobedience. *Bonshaw v. Prince*, 5 Wyatt, Webb, & A'-Beckett (Vict.), Eq. 140, cited in 31 *Moak's Eng. Rep.* 374, notes to *Box v. Judd*.

³ *Elwell v. Crowther*, 31 Beav. 163.

⁴ *London & Birmingham Railway Co. v. Grand Junction Canal Co.*, 1 Rail. Cas. 224. Where a coal mining company fouled a natural stream of water by pumping water from its mines into the stream, to the damage of a riparian proprietor, it was held (in an action at law) that the act could not be justified either by the importance of the industry to the Commonwealth, or by general custom. *Pennsylvania Coal Co. v. Sanderson*, 94 Penn. St. 302.

⁵ *Pratt v. Lamson*, 6 Allen, 457; *Mann v. Wilkinson*, 2 Sumner, 273.

⁶ *Kerr on Injunctions*, 47; *Bliss v. Rice*, 17 Pick. 230; *Canfield v. Andrews*, 54 Vt. 1.

injunction.¹ On the other hand, if the injunction has been wrongfully sued out, the court may decree the payment of damages to the defendant for the interruption of the enjoyment of his rights.²

§ 562. The prevention of multiplicity of suits is a ground of jurisdiction which courts of equity exercise in several ways.³ The taking an inquest of past damages, upon a bill to prevent a tort, and the determining and adjusting of common rights in the same subject-matter, as, for example, in the same water-power, have been sustained by the courts upon this ground. But the principal means by which equity jurisdiction is invoked to prevent a multiplicity of suits is a bill of peace.

§ 563. A bill of peace proper may be filed either by a plaintiff at law or defendant at law. If by a plaintiff at law, it invokes the concurrent jurisdiction of the court upon the ground that there are several parties in the same interest upon one side or the other, whose rights may be made the subject of separate suits at law, but which can be determined by one suit. The only equity of the bill is to make one suit do the work of several. It may be filed by one plaintiff against several defendants who claim in the same right, or by several plaintiffs who each have a claim based in all respects on the same facts, against one defendant. In either case, it would seem that the question whether the bill will lie, would, on principle, be determined by considering whether any one of the several parties, alleged to claim in the same interest, could be made a representative of the whole number, and whether an adjudication as to him as such representative would be conclusive as to the rights of all. If so, equity will take jurisdiction, but if not, it would seem that equity ought not to take jurisdiction, as, instead of preventing a multipli-

¹ *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769.

² If the plaintiff acted in good faith, that will be considered by the court. *Muller v. Land*, 31 Texas, 265.

³ The injunction against repeated trespasses, or vexatious persistence in a tort, is not an instance of this kind. *Hart v. Albany*, 9 Wend. 571, 581; *Jerome v. Ross*, 7 Johns. Ch. 315, 336.

city of suits, it would only aggravate the evil by confusing several separate suits in one. A different rule, however, was established by Lord Hardwicke in the case of *Mayor of York v. Pilkington*.¹ The decision in that case was that one who had had possession and enjoyment of a fishery for a long time could maintain a bill of peace against several adverse claimants, although they claimed by distinct and separate rights, and the rule in this case, that a plaintiff who claims by one general right may have a bill of peace against several defendants who dispute it by distinct and separate rights, has been generally followed, both in England and in America.² The laxity in this respect has been somewhat restricted, and the principle upon which this branch of equitable jurisdiction is founded has been accurately defined, in *Lehigh Valley Railroad Co. v. McFarlan*.³ There the case arose from injuries by a dam, by means of which the Morris Canal crosses the Rockaway River at Dover. Mill-owners above the dam sued the company leasing the dam for the obstruction, throwing the water back upon their mills; and mill-owners below brought suits against the company for the diversion of water by the same dam. The company asserted a general right under its charter to maintain the dam against all claimants of adverse rights, and filed a bill of peace for the determination of the rights of the parties in one suit. It was held that there did not appear to be such a unity either in the grounds on which the several actions of the defendants rested, or in the defences proposed to be made thereto, as would make a bill of peace and an issue thereunder the appropriate method of settling the questions involved. Depue, J., said: "McFarlan claims that he was injured by backwater arising from the increase in the height of the water in the pondage of the dam. The Halseys and those who represent them claim that their injuries were caused by the diversion of the waters of the river for use on the lower level of the canal. The Halseys suffered no injury from the increase in the height of the water above the dam, and McFarlan's injury is in no wise at-

¹ 1 Atk. 282.

³ 31 N. J. Eq. 730; 30 N. J. Eq.

² 1 Dan. Ch. Prac. (5th Am. ed.), 135.
341.

tributable to the abstraction of water from the river for use upon the lower level of the company's canal, and which may, to some extent, have been caused by the mode in which the lock and gates at the other extremity of the level were managed. The causes from which the injuries to the parties respectively resulted, instead of being coincident, are divergent." "The trial of an issue in which McFarlan and the Halseys were the parties on one side, involving the causes of their injuries respectively, would necessarily lead to the introduction of evidence and the investigation of issues pertinent to the complaint of the one party, and wholly irrelevant to that of the other, and in some respects, their interests would necessarily clash. On the trial of such an issue, it would be to the interest of McFarlan to show the great volume of water discharged over the dam, as bearing on the height to which the water was held above the top of the dam, and the interests of the Halseys would be promoted by showing precisely the reverse." The several defences were examined and contrasted in the same way. The learned judge also further said: "It is not indispensable that the defendants should have a co-extensive common interest in the right in dispute, or that each should have acquired his interest in the same manner, or at the same time, but there must be a general right in the complainant, in which the defendants have a common interest, which may be established against all who controvert it, by a single issue."

§ 564. As the jurisdiction in this class of cases rests upon the number of parties, it is not necessary for the plaintiff to have first established his right at law.² Where the plaintiff's cause of complaint is of equitable jurisdiction originally, but he has the same cause of complaint against many defendants, who stand in the same position, he may file a single bill against them all, and the same reasons which sustain a bill of peace will save the bill from the charge of multifariousness.³ In

¹ Page, 754.

² *Lehigh Valley Railroad Co. v. McFarlan*, 31 N. J. Eq. 730.

³ On principle, if several plaintiffs have the same equity against a single defendant, they may, if they choose,

strictness, such a bill should join as defendants only persons whose rights can be determined by a single issue; but the departure from principle originating with the case of *York v. Pilkington*¹ prevails here also, and it is settled that where the plaintiff asserts a general equitable right against several persons who infringe it, he may maintain a single bill against them all.

§ 565. The Supreme Court of California, in the case of *Keyes v. Little York Gold Washing Co.*,² attempted to confine bills of this class to cases in which they can be sustained on principle. The plaintiff in that case owned bottom lands along the Bear River. The defendants were miners severally and independently engaged in hydraulic mining at points higher up on the Bear River and its tributaries; they discharged their waste earth and debris into the stream, by which they were carried down and deposited upon the plaintiff's lands, covering them, and destroying their value. The plaintiff sought an injunction to restrain the several defendants from depositing the debris of their mines where they would be swept into the river. The defendants demurred to the bill, and the demurrer was sustained. The court said: "If a nuisance was created by the exposure of the dumps to the action of the waters of Bear River and its tributaries, a nuisance was committed by each of the defendants, when he, disconnected from the others, made or threatened such deposit; or if it be said that the matter of the *reasonable use* of the stream can enter into the inquiry, there could be no nuisance by any of the defendants who had made only a reasonable use. In either view of the case there is a misjoinder of

join in one bill on the same ground. If they do not choose to join, and the defendant wishes to be relieved from the burden of defending several suits at once, he may, on motion, obtain a stay of proceedings in all but one, until it is determined. See *Lehigh Valley Railroad Co. v. McFarlan*, 31 N. J. Eq. 730, 754.

¹ 1 Atk. 282.

² 53 Cal. 724. Compare *Woodyear*

v. Schaefer, 57 Md. 1, where the bill was to restrain the corruption of a stream by the deposit of offal from a slaughter-house therein. Other similar establishments contributed to the injury. There was no joinder in the case. The court said: "Each and every one is liable to a separate action, and to be restrained." See *Baltimore v. Warren Manuf. Co.*, 27 Alb. L. J. 387.

parties defendant. The bare statement would seem to prove the proposition, since the very essence of the objection of misjoinder of a defendant with others is that he is not connected with, or affected by," "one or more of several separate and distinct causes of action, if several are alleged. If any one of these defendants was liable to be enjoined, he could have been enjoined in a separate suit, the subject-matter of such suit being the alleged threatened wrong. If any one of the defendants is not liable to be enjoined in a separate suit, he cannot be made liable in an action like the present, for there is no principle of equity which would make a man responsible for a wrong which he has neither done nor threatened, merely by joining him with other defendants who may independently have threatened a similar wrong."¹ But in the recent case of *Hillman v. Newington*,² where the plaintiff claimed a right to a certain portion of a stream by prior appropriation, and several defendants, acting separately and independently, diverted the stream so as in the aggregate to diminish the stream available to the plaintiff to a quantity less than that to which he was entitled, it was held that he might join them all in a bill to restrain such diversion, and to recover damages for the injury. *Keyes v. Little York Gold Washing Co.* was cited on the argument, but is not alluded to in the reported opinion. The court speak of the case as *sui generis*, saying: "Each of them (the defendants) diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that, without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly." The fallacy here is apparent. Some of the defendants may have been entitled, by a subsequent appropriation, to the use of a certain portion of the stream after the plaintiff had taken the water to which he was entitled. A still later appropriator, by diverting a por-

¹ The court attempted to distinguish the case of *York v. Pilkington* as one where the action was to quiet title. The cases appear, however, to be irreconcilable.

² 57 Cal. 56.

tion of the stream, diverts water from the plaintiff. It is only by acts of all those who take subsequently to the plaintiff that his supply is diminished. And yet the act of one is rightful, and that of the other wrongful. It is impossible to try the rights of these defendants in a single issue.

§ 566. The Supreme Court of Nevada recently passed upon the question in a similar case. Several proprietors of lands, acting independently, had by user the right of draining a certain amount of waste water which had been used for irrigation over the plaintiff's land; and on one occasion the result of their acts was that an inordinate quantity of water was discharged upon the plaintiff's land. The court held that an injunction would be granted to restrain any and all of the defendants from discharging an inordinate quantity of water upon the plaintiff's land in future, but that the parties had not acted jointly, and could not be held jointly liable for damages. The judgment below for damages was therefore reversed. In the case of *Woodruff v. North Bloomfield Gravel Mining Co.*,¹ in the Circuit Court of the United States, the facts were precisely similar to those in *Keyes v. Little York Gold Washing Co.* Sawyer, J., here adopted the general rule, and held that the bill could be filed against all the defendants who contributed to produce the injury by depositing debris in the stream above. He denied the doctrine of *Keyes v. Little York Gold Washing Co.*

§ 567. The same principle which enables a plaintiff at law to go into equity in these cases may sometimes apply to a bill by a defendant at law. If a defendant has a defence which cannot be established at law, but which is good in equity, this is in itself ground for going into equity.² If the same defence applies to several suits by persons having distinct claims on the same state of facts, he may file one bill against them all; and while it is not primarily a bill of peace, the equity of a bill of peace will apply to it, and save it from the

¹ 11 Pacific Coast L. J. 181.

² *Lehigh Valley Railroad Co. v. McFarlan*, 31 N. J. Eq. 730.

charge of multifariousness or misjoinder. So, where, by the bursting of a reservoir belonging to the Sheffield Waterworks Company, over seven thousand people suffered damage, and had claims against the company, and an Act was passed to regulate proceedings by these claimants, and certificates were issued to them by public commissioners upon which they could recover judgment at law as of course, and a question arose as to the validity of certain certificates so issued which affected fifteen hundred certificates, and since the certificates enabled their holders to take judgment as of course, this defence was not cognizable at law, the company filed a bill praying an injunction against the suits at law, and for cancellation of the certificates. Upon demurrer, Vice Chancellor Kindersley overruled the demurrer, sustained the bill as within the jurisdiction of the court, and reserved the question of cancellation, and upon appeal, the decision was affirmed by Lord Chancellor Chelmsford upon both points.¹

§ 568. Where a bill of peace is filed by a defendant at law the case is different. His equity is that he is threatened with needless and vexatious litigation the rights of which have already been determined at law. He prays for an injunction restraining such suits. The bill is therefore addressed to the exclusive jurisdiction of the court. The

¹ *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8. A court of equity will refuse to interfere for this purpose, where, instead of preventing suits, the effect would be to increase litigation and complicate the rights of the parties. This was decided in the interesting case of *Sutton Harbor Co. v. Hitchins*, 21 L. J. Ch. 73. The company was authorized to improve Sutton Harbor, making compensation under the Lands Clauses Consolidation Act. The company temporarily obstructed the harbor in the course of constructing its works. The defendant, whose business was interrupted, claimed compensation, and proceeded to appoint an arbitrator under the Act.

The company filed a bill denying that he was entitled to compensation, and praying that the suit might be stayed until the defendant had established his right at law. It was urged that if the present claim were successful, the company would be open to a vast number of claims for alleged injuries, each of which would require a separate adjudication, and which the court was asked, in its discretion, to prevent. Lord Langdale, M. R., granted the injunction (20 L. J. Ch. 489), but, on appeal, the decision was reversed by the Lords Justices, on the ground that litigation would be increased by interfering, instead of leaving the parties to their remedies at law.

number of parties concerned is immaterial. The bill may be maintained by a single defendant at law against a single plaintiff. But the defendant at law must have successfully defended at least one suit before he can maintain such a bill.¹ Thus in *Eldridge v. Hill*,² A. and B. owned adjoining lots. A. altered the course of the stream somewhat by means of a ditch and used it as altered for several years. B., wishing to ascertain his rights, obstructed the ditch and returned the water to its former channel. A. brought suit in the Supreme Court for the obstruction, and while the cause was at issue and awaiting trial, brought other suits before a justice of the peace for the continuance of the obstruction. B. filed a bill stating these facts. He alleged "that there had been commenced, in all, fifteen or twenty suits, one of which was brought to trial on its merits, and a verdict given against the present plaintiff, who has sued out a certiorari and had the same allowed for removing that judgment into the Supreme Court; that the defendant continues to commence suits weekly, and threatens to do so indefinitely." The bill prayed an injunction to restrain the defendant from further prosecuting the suits pending before the justice, and from bringing any more until the principal suit should be determined. Chancellor Kent, following the English cases, held that the bill could not be allowed until the plaintiff had established his defence at law.³ The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous, is by application for the consolidation of actions, or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff.⁴

¹ *Tenham v. Herbert*, 2 Atk. 483 (case of fishery).

² 2 Johns. Ch. 281.

³ In an action for the reformation and specific performance of a contract regulating the right to overflow lands, the Supreme Court of New Hampshire granted a temporary injunction against the prosecution of a suit at law for such flowage, until the right of the plaintiff could be ascertained. And, upon granting the decree, they gave

the defendant the right to continue his suit to determine other questions, but enjoined the prosecution of further suits inconsistent with the decree. *Winnipisogee Lake Co. v. Perley*, 40 N. H. 83. It will be seen that here the plaintiff could not first establish his right at law, since it was of exclusively equitable cognizance.

⁴ *Lehigh Valley Railroad Co. v. McFarlan*, 31 N. J. Eq. 730, 754.

§ 569. Courts of equity have at times been called upon to decree specific performance of contracts relating to water, upon the ground that the legal remedy for the breach, by compensation in damages, is inadequate. It is therefore necessary for the plaintiff to show that damages will not be an adequate compensation for the injury caused. Repeated and vexatious breaches of a continuing contract, making repeated suits at law necessary, are ground for specific performance, the legal remedy being proved clearly inadequate; but in such case, the plaintiff must have first exhausted his legal remedy by at least one recovery at law. This was ruled on a bill for performance of a contract to furnish facilities for navigation of the defendant's canal for all boats used by the plaintiff.¹ Where the contract is to supply water to a mill, the necessity of receiving such supply must be shown, to support the bill; but if it be shown, specific performance will be decreed.² Specific performance of a covenant for quiet enjoyment has been refused where the alleged breach consisted merely in slightly increasing the height of water in a brook flowing through the covenantor's land, and past the premises conveyed, but causing no perceptible damage.³

§ 570. It is also necessary that the contract be in clear and definite terms, excluding all uncertainty as to the duties of the parties. Where a contract was alleged for the discharge of water from a canal into the Passaic River above the falls, which contract, it was claimed, entitled the claimants to a constant flow of three square feet of water into the stream, and an injunction was asked to enforce the agreement, Chancellor Halsted refused to grant the relief, saying: "I am not so well satisfied that this agreement calls for a constant flow of any quantity of water as to be willing to grant an injunction on the Society's bill"; "and a doubt as to the correctness of the Society's construction of the agreement in this respect would be sufficient ground for denying the injunction asked by them for the purpose of compelling

¹ *Pennsylvania Coal Co. v. Delaware Canal Co.*, 31 N. Y. 91.

² *Randall v. Latham*, 36 Conn. 48.

³ *Ingram v. Morecraft*, 33 Beav. 49.

a constant flow.”¹ The court cannot place upon the contract a meaning not originally intended, for the purpose of doing justice between the parties. Where a contract by co-owners of a canal, for its maintenance and repair, authorized any one or more of them to make such repairs as he or they should deem necessary, and bound the others to contribute to the expense of such repairs, and several of the co-owners filed a bill against the principal proprietor, alleging that extensive repairs were necessary, for which they could not advance the necessary means, and praying that the defendant be ordered to perform his part of the work, the court declined to make such a decree. The contract only bound the defendant to contribute, and he did not need to undertake repairs in the first instance unless he chose. The court could not add to the contract a further obligation.² But courts of equity may exercise their power to reform a contract in order to make it express the intention of the parties, upon a bill for reformation and specific performance, and may enforce the contract as reformed.³ A contract containing an option becomes certain as soon as the option is exercised, and will be enforced. So a grant of a right perpetually to lay off new boat-landings on a river-bank, as the bank should cave and give way before the stream, with a stipulation that when the landing should give way, the covenantor should permit the covenantee to fix another landing at any point on the front of the plantation where the public interest might require, was held sufficiently definite to be specifically enforced.⁴ This case illustrates another element

¹ *Morris Canal Co. v. Society*, 1 Halst. Ch. 203.

² *Cobb v. Cromwell*, Phil. Eq. (N. C.) 18.

³ *Winnipiseogee Lake Co. v. Perley*, 46 N. H. 83. For another case of reformation of a conveyance of water-power, see *Bunnell v. Read*, 21 Conn. 586. But where a lease of a mill included water-power equal to six horse-power, and upon a bill by the lessor for specific performance and injunction against the wrongful use of the

water, it was shown that the parties had fixed upon that amount of power under an erroneous impression as to the amount of water needed to constitute a horse-power at the site of the mill, the court held that the lessee was entitled to power equal to six-horse-power in fact, and declined to enjoin him from the use of water to that amount. *McKelway v. Cook*, 3 Green Ch. 102, 115 and note.

⁴ *Carson v. Perry*, 57 Miss. 97.

essential to the obtaining of this relief. The contract must be free from taint of fraud or unconscionable dealing. But the grant in this case, for a valuable consideration, of the exclusive right perpetually to lay off such landings upon the river front of a large plantation, near a growing town, was held not unfair, and was enforced.¹

§ 571. Contracts which are against public policy will not be enforced. But it is held that a covenant not to maintain a dam at a particular place is not opposed to the policy of the law as indicated by the Acts favoring mills, and it will be enforced.² So if great inconveniences to the public will be caused in performing the contract, this may influence the court against enforcing it;³ but a defendant cannot urge, nor will the court consider, an inconvenience to the public caused by the defendant himself, such as the interruption of his business as a carrier.⁴

§ 572. Where a covenant is continuing and is so framed that a breach of it can be ascertained only by a trial at law in each instance, it will not be enforced in equity. This was decided by Lord Eldon upon a covenant by the grantee of land containing a well, not to dispose of water from it *to the injury* of the proprietors of certain waterworks intended for public supply, but not deriving water from the well.⁵

§ 573. A contract must be mutual, that is, such that at the time it was entered into, it might have been enforced by either party against the other, in order to be enforceable in equity.⁶ If a contract lacks such mutuality at the

¹ Carson v. Perry, 57 Miss. 97.

² Ulrich v. Hull, 17 Wis. 424.

³ Chicago & Alton Railroad Co. v. Schoeneman, 90 Ill. 258.

⁴ Raphael v. Thames Valley Railway Co., L. R. 2 Ch. 147, reversing s. c. L. R. 2 Eq. 37.

⁵ Collins v. Plumb, 16 Ves. 454. The ground of the decision is the inconvenience involved in ascertaining a breach. Cf. Fry on Specific Per-

formance, 85, 41, 761. The case is discredited in 1 Story, Eq. Jur., § 736, note. It would seem that the ground upon which cases of this class are to be sustained, if at all, is the uncertainty of the terms of the contracts in not clearly indicating what will be a breach.

⁶ Fry on Specific Performance, § 286.

beginning, but the party against whom it could not be enforced performs in full on his part, he may then have it enforced against the other party.¹

§ 574. If the performance of a contract has become impossible or useless, specific performance will not be granted, because the decree would be a fruitless exercise of power. Where A. contracted to sell a wharf on the banks of the Thames, with a jetty, and the jetty proved to be liable to be removed by the corporation of London at any time, it was held that the jetty was essential to the beneficial occupation of the premises contracted to be sold, and that a specific performance could not be decreed.² And where a railway company had covenanted to erect a drawbridge in their track, so as to admit vessels from a river through a contemplated canal, and owing to an agreement made by the owners of other lands intervening between the river and the track, the canal could not be completed to the river, and would therefore be useless, a decree against the company for specific performance was refused.³ So where the suit was upon a contract to permit the plaintiff to maintain a ditch across the defendant's land, and the plaintiff sold and assigned his rights pending the suit, and the assignee had acquired by a new contract with the defendant all the rights which the plaintiff was seeking in the cause, specific performance was refused as nugatory.⁴ Courts of equity will not enforce covenants in a deed for the non-performance of which the covenantee may declare a forfeiture of the estate conveyed. The grantor has fixed his own remedy, and may forfeit the estate at his pleasure. This was determined upon a bill to enforce a *proviso*

¹ Columbia Water Power Co. v. Columbia, 5 Rich. (S. C.) 225.

² Peers v. Lambert, 7 Beav. 546. But it is well settled that where full performance is impossible, the plaintiff is entitled to performance, so far as possible, with a rebate of price. Mortlock v. Buller (*per* Lord Eldon), 10 Ves. Jr. 292, 315; Waters v. Travis, 9 Johns. 450, 465; McKay v. Carrington, 1 McLean, 50, 54; Bull v. Bell,

4 Wis. 54. And *quaere* if this rule should not have been applied in the principal case, and performance enforced.

³ Chicago & Alton Railroad Co. v. Schœneman, 90 Ill. 258. In this case the impossibility of completing the canal was caused by the company itself.

⁴ Adams v. Patrick, 30 Vt. 516.

or *condition* in a deed for the maintenance of a raceway and bridge for the grantor's benefit.¹ Specific performance will generally not be granted where the decree would affect parties not before the court.²

§ 575. Where a contract involves the performance of extensive works, equity will not assume the superintendence of such works, and for this reason, it is said, may refuse to decree specific performance; but it will grant an injunction against allowing such works to remain unperformed.³ Contracts regulating the right to overflow land will be enforced in equity.⁴ Where the plaintiff, who owned a tract of land, agreed to permit a neighbor to overflow it in consideration of the neighbor's agreement to purchase the lands, and meanwhile to allow the plaintiff to use certain other lands in exchange, which agreement the neighbor afterwards refused to perform, the court refused to enjoin the flowage, but decreed alternatively that the defendant either perform the agreement or deliver it up to be cancelled, leaving the plaintiff to his remedy at law for future flowage.⁵

§ 576. Covenants running with the land may be specifically enforced against the assignee of the property charged. So a lease of water-power to be taken at a specified place on the land of the lessor conveys an interest in land; its covenants run with the land, and will be enforced against the lessor's assignee or grantee with notice. This rule has been applied to covenants to furnish a certain amount of water,

¹ Woodruff v. Water Power Co., 2 Stock. 489.

² Glass v. Clark, 53 Ga. 380. In this case the original bill was against co-tenants A. and B. for an original injunction against maintaining a dam. The injunction was refused, but the bill retained. The plaintiffs filed a second bill against B., alleging that A. had sold his interest to B., and that B. had agreed that a decree might be granted in the former suit, and pray-

ing specific performance. The evidence as to the transfer by A. was conflicting, and the court declined to make a decree affecting his interests while he was not a party.

³ Cooke v. Chilcott, 3 Ch. D. 694.

⁴ Stevens v. Ryerson, 2 Halst. Ch. 477; Winnipiseogee Lake Co. v. Perley, 46 N. H. 83; Salmon Falls Manuf. Co. v. Portsmouth Co., 46 N. H. 249.

⁵ Stevens v. Ryerson, 2 Halst. Ch. 477.

and to raise a dam to a given height for that purpose.¹ Similarly, where a stream of water passing through the lands

¹ Noonan v. Orton, 4 Wis. 335; 21 Wis. 283; 27 Wis. 300; 31 Wis. 265. This case deserves further notice as involving several questions of equitable practice. The original bill against the lessor's assignees prayed a decree requiring the defendant to execute and deliver to the plaintiffs a lease of water-power, pursuant to the alleged covenants for renewal, contained in a previous lease; and that the defendant be required to raise his dam, according to certain other covenants in the former lease, and be restrained from interfering with the plaintiffs' enjoyment of the water. Upon demurrer the covenants were held to bind the assignee, and the lessor was held not a necessary party; and this was affirmed on appeal. 4 Wis. 335. By a supplemental bill the plaintiffs charged subsequent interference, by defendant, with their enjoyment of the water-power, and that the defendant had brought suits against persons whom they had employed to remove obstructions to the flow of water to plaintiffs' mill, and prayed an injunction to prevent further obstructions and suits by the defendant; and for an account of damages for breaches of the covenants which the new lease should contain prior to its execution. A demurrer to the supplemental bill was overruled, and the decision affirmed above; but, instead of taking account as incidental to the principal relief, it was held that in a suit for the specific performance of a covenant to furnish a lease with covenants, the court would not usually decree damages for past breaches, but, in decreeing execution, would order the lease to bear date anterior to the alleged breaches, and give the plaintiff a cause of action at law. It was then suggested that the defendant might plead the statute of limi-

tations; and the court decided that the supplemental bill for an account would be retained unless the defendant would file an undertaking not to avail himself of the statute in such action. 21 Wis. 283, 294. The defendants then answered, and the court decreed execution of a lease with the proper covenants, and binding the defendant personally in general terms. It appeared in evidence that the defendant had made a voluntary conveyance of the property, *pendente lite*, two years before the decree. The defendant appealed, and the original question of the right of the plaintiffs to a new lease was brought before the Supreme Court for the first time. Dixon, C. J., held that the alleged covenant to renew in the former lease was in reality a demise for a future term, to take effect at the option of the lessees upon notice by them, and that therefore a new lease was not necessary, and could not be granted. Cole, J., held that the covenant called for a new lease, and that the plaintiff was entitled to specific performance, but that the decree should not direct covenants to be inserted in the lease binding the defendant (the assignee) except for breaches during his ownership. The decree was reversed, and the cause remanded without directions. 27 Wis. 300, 326. One of the plaintiffs then disposed of his interest to the defendant, and discontinued the suit as to himself. The court denied a motion to dismiss the whole suit, dismissed the bill so far as it related to the prayer for specific performance, but retained it as to all questions relating to the injunctions. It was held above that the defendant was entitled to a dismissal as to the retiring plaintiff, and that the dismissal, as to the prayer of specific performance, worked no injury to either party. The cause

of different persons was divided by them by parol agreement by which each party was to maintain and repair ditches, and to receive and care for his share of the water, and the agreement was performed by both parties for a number of years, it was held that the agreement was taken out of the statute of frauds, and that it would be enforced against an assignee with notice.¹ Where a contract is in terms assignable, the assignee is entitled to specific performance. So the assignee of a contract to supply a city with water and water-power, having performed its part, was held entitled to a decree against the city.² Where the plaintiff and the owner of drowned lands agreed in writing, the plaintiff to fill in and reclaim the lands, and the defendant to convey to him, in payment, one-third of the lands in fee, and the plaintiff performed on his part, and entered into possession, and recorded his contract, it was held that he was entitled to a conveyance, and that a subsequent mortgage by the owner was subject to his rights.³

§ 577. Oral contracts affecting land, when partly performed, have generally been considered enforceable in equity.⁴ An oral contract by State drainage commissioners for the drainage of lands, and the assessment and payment of damages, under which the commissioners obtained permission to enter on the plaintiff's lands, occupy, and dig canals, was held binding in equity by the New York courts. The commissioners had power to levy and collect taxes on the lands drained, and to sell them for non-payment, and when they proceeded to exercise these powers, disregarding their contract with the plaintiff, they were enjoined from making such sale until the damages for opening the canal were adjusted according to the agreement.⁵

§ 578. Parol licenses to interfere with rights in water, or in land, have sometimes been made the subject of actions for

was remanded for further proceedings. 31 Wis. 265. This is an outline of the proceedings, so far as they relate to our subject, in a case extending through a prolonged course of litigation.

¹ *Coffman v. Robbins*, 8 Oregon, 278.

² *Columbia Water Power Co. v. Columbia*, 5 Rich. (S. C.) 225.

³ *Lavery v. Moore*, 32 Barb. 347; 33 N. Y. 658.

⁴ See *Coffman v. Robbins*, *supra*.

⁵ *Murray v. Jayne*, 8 Barb. 612.

specific performance. In Pennsylvania it has been held that a parol license, given without consideration, to divert and use the water of a stream for a mill, in consequence of which the licensee erects a mill at great expense, is irrevocable, and that equity will specifically enforce the right of the grantee by an injunction, and will give damages for interference. In Ohio it is said that a written license to put water-pipes in land, and to enter and repair them, cannot be specifically enforced, and that a violation of it is only ground for an action for damages.²

¹ *Rerick v. Kern*, 14 S. & R. 267.

² *Wilkins v. Irvine*, 33 Ohio, 138, 145.

CHAPTER XIV.

STATUTORY REMEDIES AND EFFECT THEREOF.

SECTION.

- 579, 580. In general, statutory remedies take away common-law and equitable remedies.
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604. Other States adopting this system. — Rhode Island.
605. Ibid. — New Hampshire.
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608. Ibid. — Pennsylvania.
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614. *Ibid.* — Mississippi and Alabama.615. *Ibid.* — Missouri.616. *Ibid.* — Indiana.617. *Ibid.* — Iowa.618. *Ibid.* — Michigan.619. *Ibid.* — Nebraska.620. *Ibid.* — Minnesota and Kansas.621. *Ibid.* — North Carolina.622. *Ibid.* — Tennessee.623. *Ibid.* — Georgia and other States.

§ 579. Special statutory remedies for injuries caused by acts authorized by the Legislature, and otherwise remediable at common law, usually take the place of the common-law remedies, which are thereby taken away by implication. The remedies provided in the Mill Acts for injuries authorized by them have this effect.¹ Equitable remedies,² and

¹ *Stowell v. Flagg*, 11 Mass. 364; *Wolcott Woollen Manuf. Co. v. Upham*, 5 Pick. 292; *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Baird v. Wells*, 22 Pick. 312; *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Murdock v. Stickney*, 4 Cush. 113, 116; *Leland v. Woodbury*, 4 Cush. 245; *Shaw v. Wells*, 5 Cush. 537; *Henderson v. Adams*, 5 Cush. 610; *Gile v. Stevens*, 13 Gray, 146; *Burnham v. Story*, 3 Allen, 378; *Woods v. Nashua Manuf. Co.*, 4 N. H. 527; *Hill v. Baker*, 28 Maine, 9; *Monmouth v. Gardiner*, 35 Maine, 247; *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246; *Underwood v. Wayne Co.*, 41 Maine, 291; *Veazie v. Dwinel*, 50 Maine, 485; *Dingley v. Gardiner*, 73 Maine, 63; *Bull v. Valley Falls Co.*, 8 R. I. 42; *Brown v. Commonwealth*, 3 Serg. & R. 273; *Criswell v. Clugh*, 3 Watts, 330; *Speigelmoyer v. Walter*, 3 Watts & S. 540; *Ensworth v. Commonwealth*, 52 Penn. St. 320; *Mumford v. Terry*, 2

Law Rep. (N. C.) 425; *Wilson v. Myers*, 4 Hawks, 73; *Gillet v. Jones*, 1 Dev. & Bat. (N. C.) 339; *Waddy v. Johnson*, 5 Ired. (N. C.) 333; *King v. Shuford*, 10 Ired. 100; *Gilliam v. Canaday*, 11 Ired. 106; *Hendricks v. Johnson*, 6 Porter, 472; *Lummery v. Braddy*, 8 Iowa, 33; *Stephens v. Marshall*, 3 Pin. (Wis.) 203; 3 Chand. 222; *Babb v. Mackey*, 10 Wis. 371; *Newton v. Allis*, 12 Wis. 378; *Wood v. Hustis*, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 449; *Large v. Orvis*, 20 Wis. 696. For decisions giving the same effect to a statutory remedy against the overseer of highways for injuries in providing for the drainage of the road, see *Elder v. Bemis*, 2 Met. 599; *Benjamin v. Wheeler*, 8 Gray, 409; 15 Gray, 486.

² *Bull v. Valley Falls Co.*, 8 R. I. 42; *Lummery v. Braddy*, 8 Iowa, 33. As to injunctions, see *Newton v. Allis*, 12 Wis. 378; *Crosby v. Smith*, 19 Wis. 449.

the common-law remedies by abatement,¹ may also be taken away by such special enactments.

§ 580. In the leading case of *Stowell v. Flagg*,² Parker, C. J., said: "From the general purview of the statute, made expressly to relieve mill-owners from the difficulties and disputes they were before subject to, there can be no doubt of the intention of the Legislature to take away the common-law action, which might be renewed for every new injury, and so burden the owner of a mill with continual lawsuits and expenses." In *Murdock v. Stickney*,³ Shaw, C. J., in speaking of the flowage and injury caused by the erection of a dam, said: "Here the law steps in and declares that, in consideration of the advantage to the public to be derived from the establishment and maintenance of mills, the owner of the land shall not have an action for this necessary consequential damage against the mill-owner, to compel him to prostrate his dam, and thus destroy or reduce his head of water; but it authorizes him to keep up his head of water to his own best advantage, having at the same time provided what the law deemed an adequate and practicable remedy for all the damage sustained, by a compensation in money, to be paid by the owner of the mill." Some of the more recent Mill Acts have expressly taken away the common-law remedies for injuries so authorized.⁴

¹ *Criswell v. Clugh*, 3 Watts, 330; *Speigelmoyer v. Walter*, 3 Watts & S. 540.

² 11 Mass. 364. That the Mill Act was intended to fix a measure of drainage for the future, and relieve the mill-owner from future suits, as well as afford him a remedy for public past damages, see *Commonwealth v. Ellis*, 11 Mass. 464; *Wolcott Manuf. Co. v. Upham*, 5 Pick. 292; *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Craig v. Lewis*, 110 Mass. 379.

³ 8 Cush. 113.

⁴ Mass. Public Sts. (1882), c. 190, § 28; Maine Rev. Sts. (1871), c. 92, § 23. In *Ash v. Cummings*, 50 N. H.

591, which was an action at law, the New Hampshire Mill Act of 1868 is construed. The Act provides, § 4: "No person or corporation shall derive any title from said proceedings, or be discharged from any liability in relation to said premises, until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment." The Act also provides that proceedings under it may be begun by either party, if the injury by the acts authorized be continued for thirty days without adjustment. From these provisions, and from the possibility of an injury's being continued for a great length of

§ 581. Whether the statutes protect parties proceeding under them from indictments, where their dams injure the

time, before a judgment could be reached, and the possible insolvency of the respondent at that time, and the possibility that the flowage may be found not to be of public use, the court decide that the act does not take away the common-law action until after the tender upon the judgment has been made; they even contemplate the pendency of a suit at common law and of another under the statute at the same time. Sargent, J., in delivering the opinion, said (p. 619): "If a petition should be filed under the statute, and a judgment for damages should be rendered thereon before a judgment in this suit is rendered, perhaps the plaintiff might have his election to go on with this suit, and retain any security he may have by attachment, to satisfy the judgment in this suit, or to become non-suit, and allow the subject-matter of it to be settled on the petition. If he should recover a judgment in this suit, and also on the petition, and defendants should pay both judgments, the law would not, of course, justify an injunction founded on the judgment in this suit. If plaintiff recover a judgment in this suit, and it is not satisfied, and a petition should be brought under the statute, there might, perhaps, be no objection to including in the judgment on the petition the amount of the former judgment and fifty per cent. additional, treating the petition as a suit upon the former judgment as far as it goes, and treating the former judgment as conclusive as to the estimation of the damages included in it. There would be no difficulty in settling every practical question that may arise, nothing to be compared with the difficulties that have been overcome in the construction of the Homestead Act, and some

others. If the land-owner chooses to go on with his common-law action, notwithstanding the pendency of a petition, the damages claimed in the former must be excluded from consideration in the latter." In speaking of equitable remedies, he said: "But suppose that the land-owner endeavors to prevent the mill-owner from building his dam or from flowing his land after the dam is built, by injunction, what course is to be taken, and what rule to be applied? A mill-owner, in a given case, may be wholly irresponsible, and in all cases there is a possibility that the flowage may not be deemed of a public benefit and necessary for the use of the mill, and some power must be lodged in the court to apply the general principle involved in ordinary cases of injunction to this new law. . . . In ordinary cases, upon application of the land-owner for an injunction, the court would notify the mill-owner, and, instead of giving the plaintiff his injunction, as we do in other cases, by his giving bond to respond in damages to the other party if he does not succeed, we should, to meet the spirit of this act, order that the mill-owner, in case he showed no other right to flow the land than what arises under this Act of 1868, should deposit with the clerk of the court such an amount of cash, as, upon the best evidence that the case admitted of, would be compensation for the damage about to be done; and unless he did this, or in some other way should give security equivalent to compensation, we should grant the injunction of course; but if he did this, the spirit of this Act of 1868 would authorize the court to refuse an injunction in order that the mill-owner might, by actual flowage, bring himself within the letter of this Act and proceed by petition." The de-

public, is a question upon which the courts are divided. In New Hampshire it is held that an indictment will not lie.¹ In Kentucky the statute contains, as we shall see, a provision against injuries to health; and a dam built under permission of court, but which causes injury to the health of the neighborhood, is indictable as a public nuisance.² These decisions were followed in Wisconsin, although the statute there contains no such provision.³ In Indiana the permission to build a dam is held no protection against an indictment for creating a public nuisance by flooding a highway;⁴ and in Michigan, Cooley, J., in the course of a decision upon the constitutionality of an Act, expressed the opinion in

cision is based principally on the special clause in the statute, and in view of this clause the decision that the liability to an action at law remained, was unavoidable. The suggestions of the delay possible, under the Mill Acts, of the possible insolvency of the mill-owner, and of the possible decision of the court that the flamage and injury are not for public use, are added to show the evils which were to be avoided by preserving the remedy; and also to show the reasons upon which the clause in the statute was based; and not, it seems, as grounds for the decision itself. They would not in themselves prevent the application of the doctrine of abrogation of such remedies by implication. The citations from the opinion show some of the inconveniences to which the doctrine of concurrent remedies might lead. The suggestion that if a judgment were first obtained at law, the petition might be treated as an action on the judgment, is untenable, from the nature and object of the petition, and *a fortiori* because while the judgment at law is obtained by the land-owner, the petition may be by the mill-owner, who is the judgment defendant at law. It seems that, where the remedy is retained, a better method of avoiding these

evils would be for the court to assume jurisdiction, if necessary, to grant a stay of proceedings in all actions at law, until judgment has been obtained on the petition, or the question of public use has been determined. In Indiana the statutory remedies are held not to deprive the injured party of his remedies at common law. *Toney v. Johnson*, 26 Ind. 382. And see *Smith v. Olmstead*, 5 Blackf. 37, where it is held that the common-law remedy lies unless the damages are assessed and paid. In *Snowden v. Wilas*, 19 Ind. 10, the court raise the question without deciding it, whether the statutory remedy is not exclusive. See, further, *post*, § 250, *et seq.*

¹ *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143. To same effect, see *Ensworth v. Commonwealth*, 52 Penn. St. 320; *Crittenden v. Wilson*, 5 Cowen, 165.

² Ky. Sts. 1879, c. 77, § 4; *Mountjoy v. Oldham*, 1 Marsh. 535; *Major v. Taylor*, *Ibid.* 552. See to same effect *Commonwealth v. Faris*, 5 Rand. 691.

³ *Luning v. State*, 2 Pin. (Wis.) 215.

⁴ *State v. Phipps*, 4 Md. 515. This rule is now made a part of the statute, and applies to all public nuisances created by such dams. Ind. Rev. Sts. (1881), § 1850.

general terms, that such a statute, if constitutional, would be no defence to a prosecution for a public nuisance.¹

§ 582. In Massachusetts it was held that the remedy by assumpsit or debt, allowed by the Mill Act,² to enforce payment of the annual compensation or gross damages, awarded for flowage under the Act, was not cumulative, but was substituted for and took away the common-law remedy by an action of debt on the judgment.³ Where an action has been brought for the wrongful erection of a dam built under authority, it cannot be changed by amendment into a proceeding under the statute.⁴ But where a special Act authorizes the damming of a stream for manufacturing purposes, but provides no remedy, and makes no reference to the general Mill Act, the common-law remedy must be pursued, and not that provided by the general Act.⁵ So Acts authorizing the taking, diversion, or obstruction of streams, for canals or for the improvement of navigation, or for other public pur-

¹ *Ryerson v. Brown*, 35 Mich. 333, 338. The decision in Massachusetts that the Act did not authorize the flowage of a public highway, and that for such injuries an indictment would lie (*Commonwealth v. Stevens*, 10 Pick. 247; *ante*, § 214), is in effect an authority for the same proposition. All the cases are apparently in harmony with the following proposition: The effect of the statute is to authorize the acts provided for, and their necessary consequences, and to take away the public right of indictment or action therefor. So such statutes protect one maintaining a dam in accordance with their provisions from indictment for a nuisance in obstructing the stream. But for other nuisances caused by the dam, which are not necessary consequences of the existence of the dam under any circumstances, the statutes afford no protection. One of the New Hampshire cases, on the one hand, expressly says: "But an Act authorizing one to build a dam on his own land upon

a river which is a highway, merely protects him from an indictment for a nuisance in obstructing the river; but if in doing this, he overflows his neighbor's land, he is liable to an action therefor" (*Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143, 160). And the Virginia and Kentucky cases, on the other hand, are referable to the provisions of the statutes against injuries to health, or for unforeseen injuries. Where the statute prescribes an indictment with a special form of presentment and procedure, a common-law indictment will not lie. *Commonwealth v. Plumer*, 1 Am. L. Reg. 124; *Brown v. Commonwealth*, 3 Serg. & R. 273.

² Rev. St. 1836, c. 116, § 24.

³ *Leland v. Woodbury*, 4 Cush. 245.

⁴ *Newton v. Allis*, 12 Wis. 378; *Confer French v. Owen*, 5 Wis. 112, which holds, conversely, that a statutory action cannot be changed by amendment into one at common law.

⁵ *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Lee v. Pembroke Iron Co.*, 57 Maine, 81.

poses, and providing remedies for injuries caused thereby, have generally been construed to exclude the common-law remedies.¹

¹ *Lebanon v. Olcott*, 1 N. H. 339; *Steele v. Western Navigation Co.*, 2 Johns. 283; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36; *Elder v. Bemis*, 2 Met. 599; *Tower v. Boston*, 10 Cush. 235; *Perry v. Worcester*, 6 Gray, 546; *Spring v. Russell*, 7 Greenl. 273; *Aldrich v. Cheshire Railroad Co.*, 21 N. H. 358; *Troy v. Cheshire Railroad Co.*, 23 N. H. 83; *Calking v. Baldwin*, 4 Wend. 667; *Spangler's Appeal*, 64 Penn. St. 387; *McKinney v. Monongahela Nav. Co.*, 14 Penn. St. 65; *Fehr v. Schuylkill Navigation Co.*, 69 Penn. St. 161; *Fuller v. Edings*, 11 Rich. S. C. 239; *Kimble v. Whitewater Canal Co.*, 1 Ind. 285; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Null v. Whitewater Canal Co.*, 4 Ind. 431, 435. See *Cooley on Torts*, 652; *Barker v. King's Norton Sanitary*, L. J. 17 Notes of Cas. 16. *Contra*, are *Fryeburg Canal Co. v. Frye*, 5 Maine, 38; *Crittenden v. Wilson*, 5 Cowen, 165; *Selden v. Delaware Canal Co.*, 24 Barb. 362. In the first of these cases, it was held that the common-law remedy might be resorted to against one who diverted a watercourse by statutory authority, although a remedy was provided, on the ground that there were no words of negation in the Act. In *Crittenden v. Wilson*, 5 Cowen, 165, a private Act was held merely to relieve the mill-owner from the liability to indictment, and to authorize a summary mode of appraising damages, and not to take away the remedy by action at law, upon the same ground as the preceding case, and relying on *Comyn. Dig. Action Upon Statute (C.)*. ["If a statute gives a remedy in the affirmative (without a negative expressed or implied) for a matter which was actionable by the common law, the party may sue at the common law, as

well as upon the statute; for this does not take away the common law."] This case is distinguished by *Marcy, J.*, in *Calking v. Baldwin*, 4 Wend. 667, thus: "If this be a private Act, as contradistinguished from a public Act, the law which was applied to the case of *Crittenden v. Wilson* must govern. The plaintiffs are not in such a case confined to the remedy given by the Act, but may proceed by action according to the common law. But if the work authorized by the Act be of a public character, the case is altered, and the compensation which individuals are entitled to receive for injuries occasioned by it, must be sought in the way pointed out by the Act, and not otherwise." *Crittenden v. Wilson* was cited with approval in *Susquehanna Turnpike Co. v. People*, 15 Wend. 268; *Waterford & Whitehall Turnpike v. People*, 9 Barb. 173; and *Clark v. Syracuse*, 13 Barb. 32. See, also, *Robinson v. New York Railroad Co.*, 27 Barb. 512. *Selden v. Delaware Canal Co.*, 24 Barb. 362, follows 5 Cowen, 165, and holds that where land and buildings are injured by flooding, or by the percolation of water caused by the enlargement of a canal under statutory authority, the action at common law will lie. Upon appeal, the decision was affirmed on other grounds (29 N. Y. 634), but *Selden, J.*, said: "It was insisted by the defendants' counsel that, admitting the lands to have been appropriated by the defendants, without the plaintiff's consent, the only remedy allowed to the plaintiff to obtain indemnity was that pointed out by the defendants' charter (Laws of 1823, p. 309), and that the present action, for that reason, could not be maintained. *Calking v. Baldwin*, (4 Wend. 667), which does not appear to have been noticed when this case was

§ 583. But it is equally clear upon principle, and equally established by authority, that for injuries not authorized and included in the provisions of such statutes, the common-law remedies remain in full force. A frequent example of their use is afforded by injuries by a mill-dam to a mill already existing. Such injuries are usually expressly excluded from the operation and protection of the Acts,¹ and are remediable at common law and in equity;² and in the absence of such provisions the statute is so construed by the courts.³ What shall be protected as an existing mill has been considered in many cases, and with some difference of opinion. In Massachusetts it is held that the mill must be actually completed before the injury takes place. Where the plaintiff began to erect a mill, and the defendant, beginning later, finished his dam first, and injured the plaintiff's uncompleted mill, it was held that the plaintiff could not maintain a common-law action for the injury to his mill as an existing mill, but must pursue his remedy under the Mill Act.⁴ So the common-law

first before the general term of the Supreme Court, if the principle upon which it rests is sound, would go far to sustain that position. It does not become necessary, however, to pass upon that question, as upon other grounds which have been mentioned, the judgment must be affirmed." The decision upon this point below ought, it seems, to be considered no longer law. *Crittenden v. Wilson* is cited with apparent approval in *Denslow v. New Haven Co.*, 16 Conn. 98.

¹ For statutory provisions protecting existing mills, see *Mass. Pub. Sts.* (1882), c. 190, § 2; *Maine Rev. Sts.* 1871, title 9, c. 92, § 2; *N. H. Rev. Sts.* 1878, c. 141, § 19; *Vt. Rev. Sts.* 1880, § 3224; *Rev. Sts. Conn.* 1875, p. 473, §§ 1, 3; *Wis. Rev. Sts.* 1878, c. 146, § 3375; *Va. Rev. Code*, 1873, title 19, c. 63, § 8; *N. C. Rev. Sts.* 1873, c. 72, § 8, pl. 3; *Ala. Rev. Code* 1876, § 3564, pl. 4; *Ill. Rev. Sts.* 1881, c. 92, § 2; *Ind. Rev. Sts.* 1881, §§ 898, 900; *Ky. Gen. Sts.* 1879, c. 77, §§ 6, 8; *Mich. Laws*, 1873, Act No. 196, § 12; *Tenn. Sts.* 1871, § 1920; *Mo. Rev.*

Sts. 1879, c. 132, § 6437. That permission will not be granted to build a mill which will injure one already existing, see *Larsh v. Test*, 48 Ind. 130.

² *Bigelow v. Newell*, 10 Pick. 348; *Smith v. Agawam Canal Co.*, 2 Allen, 355, 357; *Burnham v. Story*, 3 Allen, 378; *Brigham v. Wheeler*, 12 Allen, 89; *Williams v. Elting Woollen Co.*, 33 Conn. 353; *Hendricks v. Johnson*, 6 Porter, 472; *Thomas v. Hill*, 31 Maine, 252; *Wentworth v. Poor*, 38 Maine, 243; *Stickney v. Munroe*, 44 Maine, 195; *Lincoln v. Chadbourne*, 56 Maine, 197; *Lee v. Pembroke Iron Co.*, 57 Maine, 481; *Moore v. Coburn*, 1 Pin. (Wis.) 538; *Large v. Orvis*, 20 Wis. 696; *Hill v. Ward*, 2 Gilman, 285; *Close v. Samm*, 27 Iowa, 503.

³ *Mowry v. Sheldon*, 2 R. I. 369; *Stone v. Peckham*, 12 R. I. 27, 28. *Confer Seeley v. Bridges*, 13 Neb. 547, which holds that such injury will be enjoined, although the statute contains no provision.

⁴ *Baird v. Wells*, 22 Pick. 312. A decision similar in effect is given in

remedies for injuries to existing mills are strictly confined to injuries to the mills and works. The plaintiff cannot include

Hendricks v. Johnson, 5 Porter, 208. But see *Elting Woollen Co. v. Williams*, 36 Conn. 310, in which the court hold that where two persons are seeking to appropriate the same power, one as owner, and one under the flowage Act, the law will favor the owner; and that this will not be altered by the fact that the owner has recently purchased the power with knowledge at the time that the petitioner was negotiating for the right to flow it. The statute of Wisconsin (Rev. Stats. 1878, c. 146, § 3375) protects mills already existing or in "process of erection." Water-power held by the owner, near a mill actually in use, with the intention at some future time to use it for the mill, is protected by the act. *Occum Co. v. Sprague Manuf. Co.*, 35 Conn. 496; *Elting Woollen Co. v. Williams*, 36 Conn. 310. But small mills which are not actually used as mills, but were erected merely to protect a right of flowage, are not entitled to the protection of the Act. *Occum Co. v. Sprague Manuf. Co.*, 35 Conn. 496. A mill is held to be "lawfully existing," though its dam is maintained a little higher than it should be. *Robertson v. Miller*, 40 Conn. 40. No person can avail himself of the privileges conferred by the Mill Act of Massachusetts, nor bring himself within its protection merely by erecting a dam across a stream running through his land. There must be coupled with such erection the building of a mill for use, or the *bona fide* provable intent to erect one forthwith. *Fitch v. Stevens*, 4 Met. 426; *Veazie v. Dwinel*, 50 Maine, 479, 485. A dam used to float timber to a steam saw-mill is not protected. *Bryan v. Burnett*, 2 Jones L. 305. Injury to a canal and waste weir connected with a water-mill has been held an injury to a mill within the

Massachusetts statute. *Dean v. Colt*, 99 Mass. 480. In *Bottomly v. Chism*, 102 Mass. 463, a reservoir dam used with a mill was held entitled to protection as an existing mill, under the Massachusetts Act. The owner of property already appropriated for milling purposes cannot have an injunction to restrain proceedings which will authorize flowage injurious to him. If he can appear in such proceedings, his remedy there is complete; if not, the proceedings will be void as to him, and he can enjoin the flowage itself. *Williams v. Elting Woollen Co.*, 36 Conn. 313. In Rhode Island it is held that where a person has erected a dam for mill purposes, no one is authorized to erect a mill-dam in such a way as to flow out the former dam, or destroy its fall of water, even though no mill has been built or begun thereon, unless the design for building a mill has been abandoned. If the proprietor of such dam should represent that he intended to abandon the dam for mill-purposes, he would be estopped to deny that such were his purposes, as against one who has been influenced by his representations, to build a dam below which injures the fall at the dam above. If the dam is built for other than mill-purposes, it is not entitled to protection under the Act against flowage by a later dam, built for mill-purposes. The erection of a dam or mill-privilege available for mill-purposes furnishes *prima facie* presumption that the dam is intended for such purposes, and the fact that it is slightly built, is not sufficient to rebut the presumption. *Mowry v. Sheldon*, 2 R. I. 369. The right to an injunction to protect an existing mill or mill-site, may be lost by acquiescence in the building of another mill. *Nosser v. Seeley*, 10 Neb. 460. In Indiana, a

in his action at law injuries to his meadows; nor will equity enjoin such an injury; for these he must proceed under the Act.¹ On the other hand, the Delaware statute of 1773, for the encouragement of mill-owners, which gives them a summary remedy for damages occasioned by the erection of other dams, has reference to the location of new mill-sites, and is held not to apply to a change in the construction of dams already erected. For injuries by such changes the common-law remedy must be pursued.²

§ 584. For all injuries caused by persons proceeding under such statutes, but acting in excess of their authority, the common-law actions lie. So where the height at which a dam may be maintained has been determined by proceedings under the Mill Acts, any injuries caused by maintaining the dam at a greater height are unauthorized and remediable at common law.³ So if the right to flow lands is limited to

purchase or holding of land, with the declared intention to build a mill in the future, does not entitle the holder to the protection of the statutes, but the collection of machinery and materials, and excavation of a foundation, is sufficient to entitle him to the protection of the statute. *Miller v. Stowman*, 26 Ind. 143; *Larsh v. Test*, 48 Ind. 130. Any *bona fide* improvement of a water-power, with intent to use as such, makes it a "power previously improved" under the Minnesota statute. *Miller v. Troost*, 14 Minn. 365. The Missouri statutes formerly contained no provision protecting existing mills. In *Hook v. Smith*, 6 Mo. 225, it is held that where conflicting applications are made on the same day, or within a few days of each other, the court may exercise its discretion and grant permission to the one which will cause least damage to the public or individuals. The present statute gives the court power, on petition of the owner of any existing mill, to restrain such injuries. 2 Mo. Rev. Sts. (1879), § 6437. In a late

case it is held that a dam authorized, but not completed within the time prescribed, is not a lawfully existing dam, and cannot be legitimated by lapse of time, so as to entitle the owner to the protection of the statute against injuries by other mills. *Huffman v. Vaughan*, 72 Mo. 465. In *Humes v. Shugart*, 10 Leigh, 332, the Virginia court denied a second application made shortly after granting a former one for erecting a mill in the same neighborhood.

¹ *Large v. Orvis*, 20 Wis. 696.

² *Garrett v. Bailey*, 4 Har. (Del.) 197.

³ *Johnson v. Kittredge*, 17 Mass. 76; *Winkley v. Salisbury Manuf. Co.*, 14 Gray, 443; *Leonard v. Wading River Co.*, 113 Mass. 235; *Brady v. Blackinton*, 113 Mass. 338; *Arimond v. Green Bay Co.*, 31 Wis. 316. See *Hiscox v. Sanford*, 4 R. I. 55, where the height was determined by contract. If the defendant increases the height of his dam in order to enlarge his mill, or to supply a new mill with power, this is in effect a new taking under the

certain seasons of the year, and the person using the mill flows the lands at other seasons, he is liable as a wrong-doer.¹ So where the Act authorizes dams across unnavigable streams, a dam across a navigable stream is in no way entitled to the protection of the Act.² So, where a dam is maintained by the defendants for the use of a mill not owned by them, nor situated on their land, it is not within the provisions of the Mill Act of Maine, and the common-law actions will lie for an injury caused by such a dam.³ So, an obstruction of the public use of a stream, as a water-way for rafts and timber is unauthorized by the Acts. The mill-owner may dam streams available for such transportation, but must keep a suitable passage-way for boats and rafts; and for injuries to this use the common-law remedies may be maintained.⁴ So it is held in Massachusetts that the Mill Act does not authorize the flowage of a public highway already appropriated and in actual use; and for such flowage an action at law may be maintained, or an indictment will lie.⁵ So, if

statute, and the statutory method must be pursued. *Johnson v. Kitredge*, 17 Mass. 76; *Leonard v. Schenck*, 3 Met. 359. A charter giving the right to erect a dam on the company's own land gives no right to flow the land of others without their consent. For such flowage the common-law actions lie. *Company v. Goodale*, 46 N. H. 153.

¹ *Hill v. Sayles*, 12 Met. 142. The plaintiff in this case afterwards recovered damages in a second action for a repetition of the injury. 4 Cush. 549; and then was granted an injunction against such unauthorized flowage. 12 Cush. 454. On the appeal in the first case, Shaw, C. J., said (12 Met. 150): "By the rule of the common law, the land-owner has a right to have the natural water-course kept open the whole time. By the statute, and the proceedings under it, the mill-owner has acquired a right to keep his dam up a certain part of the time, paying a certain amount of damage. For the residue of the year

the land-owner remains in the enjoyment of his common-law right, and is entitled to his common-law remedy for the infringement of it."

² *Bryant v. Glidden*, 36 Maine, 36; *Strout v. Millbridge Co.*, 45 Maine, 76. See, also, *Renwick v. Morris*, 7 Hill, 575, where a statute authorized a person to maintain a dam in a navigable river, and the dam was so built as to obstruct the navigation beyond what the Act authorized. It was held a public nuisance, and liable to abatement *pro tanto* by any one, though it had stood for more than twenty years.

³ *Crockett v. Millett*, 65 Maine, 191.

⁴ *Veazie v. Dwinel*, 44 Maine, 167; *Veazie v. Dwinel*, 60 Maine, 479; *Knox v. Chaloner*, 42 Maine, 150; *Treat v. Lord*, 42 Maine, 552; *Parks v. Morse*, 52 Maine, 260; *Lancey v. Clifford*, 54 Maine, 487.

⁵ *Commonwealth v. Stevens*, 10 Pick. 247. To same effect under the Kansas statute, see *Venard v. Cross*, 8 Kansas, 248, where an injunction was granted.

a mill is abandoned, and the right to flow lost, and a highway is laid out over the land formerly flowed, the highway gains the prior right; and if the mill-owner or his grantee injures it in attempting to re-assert the right to flow, he is liable to indictment.¹ In reality any maintenance of the dam apart from the public benefit gained from the mill provided with power thereby, is unauthorized. So, if the mill-owner abandons his mill, but maintains his dam, he is liable at law to those injured.²

§ 585. If a mill-owner makes a canal leading water into another's land, this is not within the protection of the Massachusetts statute.³ So trespasses in the construction of a dam or boom are not within the scope of the statutory remedy, and are actionable wrongs.⁴ So where the provisions of the Mill Act were extended, so as to include the taking of waters to furnish a water-supply to cities and

¹ *Commonwealth v. Fisher*, 6 Met. 433. So the remedy of a town against a mill-owner for overflowing a road which the town is obliged to repair, and does repair, is by action on the case and not under the Mill Act. *Andover v. Sutton*, 12 Met. 182. St. 1873, c. 144 (Pub. Sts. c. 190, § 42), establishes a proceeding by which a mill-owner can acquire the right to flow a highway. For the details of this procedure, see *infra*, the sections on Remedies under the Mill Acts. See a similar provision in Minnesota, Gen. Sts. 1878, c. 31, § 23, p. 331.

² *French v. Braintree Manuf. Co.*, 23 Pick. 216; *Hodges v. Hodges*, 5 Met. 205; *Fuller v. French*, 10 Met. 359. Mere disuse of a canal by a canal-company and a sale of its mill properties, reserving all rights necessary for the preservation and use of the canal, is not an abandonment. *Heard v. Talbot*, 7 Gray, 113.

³ *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68.

⁴ *Perry v. Wilson*, 7 Mass. 393; *Henley v. Wilson*, 77 N. C. 216. The

North Carolina Mill Act provides for acts done on the defendant's own land. *Battle*, N. C. Rev. St. c. 72, §§ 13 *et seq.* It would be a proper exercise of legislative power, however, to authorize an entry on another's land for the purpose of erecting a boom or dam, upon proper conditions as to compensation. *Per Parsons, C. J.*, in *Perry v. Wilson*, 7 Mass. 393. In Pennsylvania, an Act authorizing persons to maintain dams and obtain control of the channels of streams, for the purpose of floating lumber and rafts to market, has been construed to authorize such acts only by public companies. Where individuals, acting for their private benefit, erected a temporary dam for such purposes, which they used in such a way as sometimes to cut off the water from the plaintiff's mill, and at other times flooded out his wheel, and injured his dam, by driving logs upon it, the court held that the plaintiff's remedy was at common law and not under the statute. *Finney v. Somerville*, 80 Penn. St. 59.

towns, this extension was held not to imply a grant of power so to take water; and where the defendant diverted a stream in order to carry out a contract to supply a town with water, such diversion was enjoined.¹ So under the Virginia system of Acts, if the order granting permission to build the dam is obtained without notice to the person in possession of the lands to be taken, or without adjudicating his rights, his right to possession will be unaffected and he may have a writ of forcible entry and detainer.² So where a permission was granted to erect a dam with the condition that it should not be so maintained as to cause injury to a certain ford, a declaration *in case* for raising the dam so as to violate this condition, to the injury of the plaintiff, was held good.³

§ 586. Similarly the common-law remedies lie for injuries caused by persons who proceed under the authority of such Acts, but fail to comply with their requirements. If a Mill Act imposes conditions precedent to acquiring the right to flow, they must be strictly performed by one claiming the right, or he is liable as a wrong-doer.⁴ So, if the claimant fails to make compensation at the time and in the manner determined by the act or proceedings, or to give the security required for the payment of future damages,⁵ or to perform the other duties imposed on him, he forfeits his rights under the Act, and renders a further maintenance of the dam

¹ *Howe v. Norman*, 13 R. I. 488. The extension was held to be simply of the procedure under the Mill Acts to control the taking for such purposes when the right should be granted. The Mill Act of Mississippi has been held not applicable to injuries caused by a ditch and levee. *Price v. Lagroue*, 57 Miss. 839.

² *Wolf v. Coffey*, 4 J. J. Marsh. 41.

³ *Hardy v. McNeil*, 8 B. Mon. 449.

⁴ A strict compliance with the statutory method of procedure is a condition precedent to the acquisition of rights. A failure to follow the statu-

tory method renders the mill-owner liable as a wrong-doer. *Hunting v. Waterman*, 10 Iowa, 152; *Akin v. Davis*, 11 Kansas, 580. So the writ must be sued out before building the mill and dam. A writ sued out afterwards was formerly held ineffectual. *Smith v. Olmstead*, 5 Blackf. 37; *Summy v. Mulford*, 5 Blackf. 113; s. c. 202. See a similar opinion in Alabama. *Hendricks v. Johnson*, 5 Porter, 208. *Contra*, see *Wright v. Pugh*, 16 Ind. 106; and Ind. Rev. Sts. 1881, § 883, pl. 9.

⁵ *Stowell v. Flagg*, 11 Mass. 364.

a nuisance to be restrained or abated in equity.¹ This rule applies to persons purchasing from the claimant subsequent to the proceedings. They take subject to the duties imposed.²

§ 587. Injuries unforeseen and unprovided for constitute another class for which the common-law remedies survive.³ The Virginia Mill Act, and several of the statutes modelled upon it, contain clauses expressly saving existing remedies for injuries not actually foreseen and estimated upon the inquest.⁴ These Acts also provide that permission shall not be given to erect dams which will cause injury to health.⁵ So where a dam duly authorized, and found by the inquest not likely to injure

¹ *Ackerman v. Horicon Iron Co.*, 16 Wis. 150; *Zweig v. Horicon Iron Co.*, 17 Wis. 362; s. c. 20 Wis. 40; *Akin v. Mills*, 29 Wis. 322; *Arimond v. Green Bay Canal Co.*, 31 Wis. 316; s. c. 35 Wis. 41; *Wight v. Packer*, 114 Mass. 473; *Kirkendall v. Hunt*, 4 Kansas, 514. See, also, *Hill v. Sayles*, 12 Cush. 454, cited above. In New Hampshire, as we have seen, the statute of 1868 is interpreted by the aid of the constitution to require the claimant to make compensation before the land is flowed, and not to take away the common-law remedies until after an assessment and judgment are had under the Act, and payment or tender of the amount. *Ash v. Cummings*, 50 N. H. 591.

In Wisconsin, it is held that judgment may be given in the alternative, upon proper allegations and proofs, for the payment of compensation and establishment of the right to maintain the dam; or, on non-payment, for the abatement of the dam. *Cobb v. Smith*, 38 Wis. 21. In an action to abate for non-payment of compensation, it is not necessary to join the mill-owner's grantees of the use of the water; but such grantees may be made defendants at their request, and by payment of the compensation they may prevent an abatement.

Newell v. Smith, 26 Wis. 582. On the other hand, the mill-owner may maintain an action at law for an obstruction of the stream to his injury, pending the proceedings for acquiring his right. *Hendricks v. Johnson*, 9 Porter, 208. A mere promise by the builder of the dam to pay the damages assessed does not bar the action for nuisance, and will not be ground for an action. *Cave v. Calmes*, 3 Marsh. 36.

² *Wight v. Packer*, 114 Mass. 473.

³ *Denslow v. New Haven & Northampton Co.*, 16 Conn. 98; *Eames v. New England Worsted Co.*, 11 Met. 570; *Coe v. Hall*, 41 Vt. 325; *Calhoun v. Palmer*, 8 Gratt. 88, 100; *Waddy v. Johnson*, 5 Ired. 333; *Watson v. Van Meter*, 43 Iowa, 152. See *Smith v. Olmstead*, 5 Blackf. 37.

⁴ Va. Code, 1873, Title 19, c. 63, § 11; Miss. Rev. Code, 1880, § 932; 2 Mo. R. S. 1879, § 6435; Iowa Rev. Sts. 1882, § 1201. See Ind. Rev. Sts. 1831, c. 1, § 8; Ind. Rev. Sts. 1881, § 1859.

⁵ Ala. Code, 1876, § 3564; Ark. Rev. Sts. 1874, § 4225; Fla., McClellan's Dig. c. 152, § 6; Ill. Rev. Sts. 1881, c. 92, § 1; Ind. Rev. Sts. 1881, § 887; Ky. Rev. Sts. 1879, c. 77, § 4; Miss. Code, 1880, § 928; N. C. St. 1873, c. 72, § 9; Va. Code, 1873, Title 19, c. 63, § 6; 2 West Va. St. 1879, c. 91, § 31; 2 Tenn. St. 1871, § 1920.

health, afterwards causes injury to health, the remedy is at common law.¹ So where the statutes contain no such provisions, they are usually construed to provide remedies for injuries by flowage and the withholding of water only; and the common-law remedies are sustained for injuries to health caused by dams maintained under the Acts.² The saving clause in the Virginia statute, and those which follow it, extend to damages which though contemplated by the statute as grounds for recovery in the special proceeding, were not included in the finding of damages. It is held that in a second action, the jury in the original proceedings will be presumed, in the absence of proof, to have foreseen and estimated all the damages which it was then practicable to foresee and estimate,³ and the statute does not save a right of action for damages foreseen but miscalculated.⁴

§ 588. The right to compensation for incidental injuries caused by works of public utility is elsewhere considered.⁵ With respect to remedies where the right to compensation for incidental injuries is admitted, but is not provided for as a taking, the remedy is usually held to be by an action on

¹ Commonwealth v. Favis, 5 Rand. 691; Miller v. Trueheart, 4 Leigh, 569. See Waddy v. Johnson, 5 Ired. 333, in which it is held that, where a person's lands are *flowed*, the statute intended to allow all incidental injuries caused by *such flowage*, *e.g.*, injuries to health to be included in the finding; but that where a person's lands are not flowed, the remedy is by common-law action. And see Bridges v. Purcell, 1 Ired. 232, establishing the first part of the rule.

² Rooker v. Perkins, 14 Wis. 79; Eames v. New England Worsted Co., 11 Met. 570. In Palmer Co. v. Ferrill, 17 Pick. 58, 66, Shaw, C. J., says: "The rule, therefore, which seems to be derived from the statutes construed together, seems to be to estimate the pecuniary loss arising to the

proprietor, from the direct injury done to his estate, taken as a whole, by flowing, deducting therefrom any benefit which may be done to the same estate by the same cause, namely, by flowing." In Gile v. Stevens, 13 Gray, 146, flowage below a dam was held within the protection of the statute. But injuries to personal property upon the lands flowed, *e.g.*, peat, dry or curing upon a meadow, are not grounds for recovery under the statute. And injuries to manure placed upon land cannot be made an item of damages, apart from the reality. For such injuries the remedy is at common law. Gile v. Stevens, 13 Gray, 146.

³ Ellis v. Harris, 32 Gratt. 684.

⁴ Kepley v. Taylor, 1 Blackf. 152. See Bell v. Elliot, 5 Blackf. 113.

⁵ See *ante*, §§ 243-250.

the case.¹ Where certain Acts authorized the defendant to enter upon a river-bed and alter it for the purpose of improving its channel, and provided a special remedy for injuries caused in carrying the Acts into effect, it was held that this remedy did not extend to injuries caused by the defendant in floating timber over the plaintiff's dam, and that the action on the case would lie.²

¹ In *Wabash v. Erie Canal Co.*, 16 Ind. 441, it was held that the flowing of lands by a canal company by statutory authority was not a taking within the statutory provision, and that an action at law could be maintained for such flowage. In *Snowden v. Wilas*, 19 Ind. 10, the same question is raised as a new question, but not decided. The action on the case will lie for such injuries. *Locks & Canals v. Nashua Railroad Co.*, 10 Cush. 385, 388; *Estabrooks v. Peterborough Railroad Co.*, 12 Cush. 224; *Trenton Water Power Co. v. Raff*, 7 Vroom, 335; *Hooker v. New Haven Co.*, 14 Conn. 146; s. c. explained, 15 Conn. 312; *Burroughs v. Housatonic Railroad Co.*, 15 Conn. 124, 132. See *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 321; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Nevins v. Peoria*, 41 Ill. 502, 510. An injunction may also be had against such injuries, unless compensation is made. *Pettigrew v. Evansville*, 25 Wis. 223. That any such injury constitutes a taking, see *Eaton v. Boston Railroad Co.*, 51 N. H. 504; and see *Cooley Const. Lim.* (5th ed.), 570. But see *Bellinger v. New York Central Railroad Co.*, 23 N. Y. 42; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Penn. St. 357; *Selden v. Delaware Canal Co.*, 29 N. Y. 634; *Losee v. Buchanan*, 51 N. Y. 476; *Moyer v. New York Central Railroad Co.*, 88 N. Y. 351; *Illinois Central Railroad Co. v. Bethel*, 11 Brad. (Ill.) 17.

² *Coe v. Hall*, 41 Vt. 325. The case of *Denslow v. New Haven & Northampton Co.*, 16 Conn. 98, must, it seems, be referred to the principle of injuries unprovided for, if supported at all. There the defendants erected a dam under the authority of their charter, and with the approval of the commissioners appointed under it. The dam caused injury to a mill-site above belonging to A. The commissioners were never called on to assess damages on this account. A. afterwards sold his mill-site to B. It was held that the commissioners could not take cognizance of subsequent injuries arising from time to time, and that B. could maintain an action on the case for the injuries. The court held that "where no steps are taken to present the case before them in the proper manner, the parties are left in the same situation as if no such authority was given, and, of course, that the defendants must be responsible as at common law." This is too broad. A mere failure by the injured party to bring his injuries before the commissioners, in the method provided, would not entitle him to an action at law. Such a rule would abrogate the doctrine of *res adjudicata*, and would in effect give the plaintiff an election of remedies. The case approves the rule in *Crittenden v. Wilson*, 5 Cowen, 165, which gives such an election, and must be considered so far wrong.

§ 589. For injuries caused by negligence or by abuse of the powers delegated by statute to persons or companies, for the public good, the common-law remedies will lie. Such acts are not authorized, and are not within the scope of the statutory remedies.¹ A mill-owner maintaining a dam under the statute is liable at common law for letting out water in unreasonable quantities, and wrongfully overflowing the lands and damaging the property below.² So where the defendant maintained a dam under the Mill Act, but wrongfully withheld water from the plaintiff by closing his gates at night, the plaintiff's remedy was held to be at common law.³ In *Schuylkill Navigation Co. v. McDonough*, which was an action on the case by McDonough against the company, for injuries caused by suffering a dam and pond to become

¹ *Estabrooks v. Peterborough Railroad Co.*, 12 Cush. 224; *Gile v. Stevens*, 13 Gray, 146; *Thompson v. Moore*, 2 Allen, 350; *Rich v. Keshena Improvement Co.*, 56 Wis. 287; *Steele v. Western Nav. Co.*, 2 Johns. 283; *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Penn. St. 357; *Fehr v. Schuylkill Navigation Co.*, 69 Penn. St. 161. Negligence or wantonness by a *public officer*, acting under a statute providing a special remedy, will not be ground for an action at common law. The ground for this exception is that the discretion of public officers is not controllable. But in such case the special remedy lies. *Benjamin v. Wheeler*, 8 Gray, 409; 15 Gray, 486.

² *Clapp v. Herrick*, 129 Mass. 292.

³ *Thompson v. Moore*, 2 Allen, 350. In this case, Bigelow, C. J., after alluding to the broad terms of the Act ("overflowed or otherwise injured"), said: "But, looking at the original design and intent of the legislature in enacting laws for the support and regulation of mills, and taking into view the successive Acts which have been passed *in pari materia*, it is clear that the remedy thereby provided is

intended to be confined solely to cases where land is overflowed by raising a head of water, and to the incidental and consequential damages which necessarily and naturally arise therefrom. This is settled by a series of adjudicated cases. For all other injuries the remedy at common law still remains, and the party sustaining damage can maintain an appropriate action to recover it. *Hill v. Sayles*, 12 Met. 142; *Andover v. Sutton*, *Ib.* 182; *Eames v. N. E. Worsted Co.*, 11 Met. 571; *Murdock v. Stickney*, 8 Cush. 116. In the case at bar the whole injury alleged arises not from an overflow of water occasioned by the dam of the defendants, but from a diversion or withholding of it from the course or channel through which it ought to flow to the premises of the plaintiff. Such an act is not the usual, ordinary, or necessary result of the erection of a mill, and was not intended to be comprehended in the class of cases to which the Mill Acts are applicable. The plaintiff, therefore, is entitled to maintain his action at law to recover damages for an act of the defendants which he has proved to have been unlawful."

filled with dirt,¹ the court said: "The remedies against the company, provided by the Act of incorporation, are for the injuries arising from the construction of the dam as a part of the navigable highway; and they do not exclude the common-law remedies for injuries arising from an abuse of the privileges granted to the company, or for the neglect of its duties." So the common-law actions lie for the negligent diversion or obstruction of a watercourse, or for the detention and accumulation of water, in the construction of a public work.²

§ 590. Rights upon contracts between land-owners and mill-owners are usually not affected by the statutes, and are enforceable by the ordinary remedies at common law and in equity, and not by proceedings under the statutes.³ The decisions as to the effect of the statutory remedy upon the power of the parties to bind themselves by a submission to arbitration, which will be enforced at law, are by no means uniform. In *Hunt v. Whitney*,⁴ the claim for damages by flowage was submitted to referees, who awarded damages for both past and future flowage, and a sum in gross for all damages thereafter to be sustained. The award was approved, and judgment rendered thereon, and the complainant elected to take the sum in gross. The defendant paid the award for past damages, gave notice at once of his abandonment of the

¹ 33 Penn. St. 73, 79. The injuries here considered are those alleged in the fourth count.

² *Bailey v. Mayor of New York*, 3 Hill, 531; *Bellinger v. New York Central Railroad Co.*, 23 N. Y. 42; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 492; *Delaware Canal Co. v. Lee*, 22 N. J. L. 243; *Pittsburgh Railway v. Gilleland*, 56 Penn. St. 445; *Dearborn v. Boston Railroad Co.*, 24 N. H. 179; *Hatch v. Vermont Central Railroad Co.*, 25 Vt. 49; *Waterman v. Connecticut Railroad Co.*, 30 Vt. 610; *Spencer v. Hartford Railroad Co.*, 10 R. I. 14; *Southside Railroad Co. v. Damel*, 20 Gratt. 344; *Selma Railroad*

Co. v. Keith, 53 Ga. 178; *Terre Haute Railroad Co. v. McKinley*, 33 Ind. 274; *King v. Iowa Midland Railroad Co.*, 34 Iowa, 458; *McCormick v. Kansas City Railroad Co.*, 57 Mo. 33; *St. Louis Railway Co. v. Morris*, 35 Ark. 48; *Oregon Railroad Co. v. Barlow*, 3 Oregon, 311. The same is true of injuries from the negligent construction of a drain, under statutory authority, though the statute provides a remedy for damages by the proper exercise of the power. *Jackson v. Portland*, 63 Maine, 55.

³ *Harding v. Goodlett*, 3 Yerger, 41.

⁴ 4 Met. 603.

right to flow the lands in future, and drew down the water so as to leave the plaintiff's land free. The plaintiff brought suit on the award for the future damages. The court held that the defendant had the right, under the circumstances, to abandon his right of future flowage and avoid liability therefor. No question was raised as to the validity of the award. If the award had been deemed invalid, the case could have been disposed of on that ground. In the next case involving the question, it was held that where a mill had been abandoned, the dam was not protected, and that the common-law remedies lay. A submission to arbitration was therefore upheld.¹ In *Henderson v. Adams*² the question was raised as to the validity of a statutory arbitration of a claim for flowage, and it was held invalid because the claim for flowage was not within the terms of the statute on arbitrations. The statute provided a method for the arbitration of "all controversies which might be the subject of a personal action at law or of a suit in equity." It was held that the Mill Act had rendered flowage not the subject of such actions and suits. This was affirmed in *Carpenter v. Spencer*.³ But here the court went further, and held that the power of the courts to give judgment for future damages under the Mill Acts was purely statutory, and that such judgments must be rendered in proceedings conforming to the statute. The court, therefore, could not enter judgment for such damages upon an award. In *Winkley v. Salisbury Manuf. Co.*⁴ a claim for flowage was submitted to arbitrators, giving them "all the authority to decide upon said actions and causes of action and damages, which a court of law or

¹ *Hodges v. Hodges*, 5 Met. 205.

² 5 Cush. 610.

³ 2 Gray, 407. Shaw, C. J., said: "The power to render such judgment, not only affording a remedy for an injury actually incurred, but looking to the future, and declaring the rights of the parties specifically, and giving a remedy by action of debt or assumpsit, by and against privies in estate, depends wholly on statute, and can exist only in cases provided by

statute. The statute gives this right only in cases commenced, prosecuted, and determined, according to the Mill Act. Rev. Sts. c. 116. Whether such a judgment for damages already accrued would be binding upon the parties and their personal representatives, we have no occasion now to consider; beyond that, we are of opinion that it is void, because not within the statute."

⁴ 14 Gray, 443.

jury might have, in deciding on the same by virtue of the law and statutes of the Commonwealth of Massachusetts, especially the statutes for the support and regulation of mills." The arbitrators awarded past and future damages, and decided upon the height at which it was necessary to maintain the dam. The court held that the same effect was to be given to such an award as to the verdict of a jury under proceedings duly had according to the statute. This rule has been followed in several cases, but the cases of *Henderson v. Adams*, and *Carpenter v. Spencer*, are not referred to, either in the leading case of *Winkley v. Salisbury Manuf. Co.* or the succeeding cases.¹

§ 591. The repeal of a statute delegating the power of eminent domain renders any further acts by the grantee, in the exercise of such power, torts for which the parties injured may maintain the common-law remedies.² In Wisconsin the Mill Acts are held to be such delegations of the power of eminent domain, and their repeal is held to restore the common-law remedies to parties injured by flowage continued after the repeal.³ Where, as in Massachusetts, the Mill Acts

¹ *Bates v. Sloan*, 5 Allen, 178; *Leonard v. Wading River Reservoir Co.*, 113 Mass. 235; *Wight v. Packer*, 114 Mass. 473. The same doctrine is held in *Fitch v. Taft*, 126 Mass. 503, but the earlier cases are not referred to. In Maine, the claim under the statute may be arbitrated. *Bradstreet v. Erskine*, 50 Maine, 407; *Duren v. Getchell*, 55 Maine, 241. Unless the title to real estate is expressly involved. *Quinn v. Besse*, 64 Maine, 366. And it was held in *Fryeburg Canal Co. v. Frye*, 5 Maine, 38, that a claim for damages, caused by the company in proceeding under a special Act providing a remedy, might be arbitrated. But the statutory remedy was expressly held merely cumulative. For the effect of an award as a defence in proceedings under the statute, see *ante*, § 582.

² That the statutory remedy is

taken away by such repeal, see *Commonwealth v. Beatty*, 1 Watts, 382; *Hampton v. Commonwealth*, 19 Penn. St. 329. The right of the State to revoke a license granted by statute, to divert a watercourse for manufacturing purposes, or to grant another license impairing the former, is affirmed in *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *New York Railroad Co. v. Young*, 33 Penn. St. 175; *Rundle v. Delaware Canal Co.*, 14 How. 80.

³ In *Stephens v. Marshall*, 3 Pin. (Wis.) 203; 3 Chand. 222, it was held that the Mill Act gave vested rights to mill-owners taking the benefit of it, which could not be taken away by repeal. This was overruled in *Pratt v. Brown*, 3 Wis. 603. Here the court held (*per* Smith, J.) that the taking was by the sovereign, through the

are held not an exercise of the power of eminent domain, but merely an alteration of the remedies for injuries caused by mills and dams, it would follow upon principle that the sovereign might again alter the remedies; that a repeal of the Mill Acts would be such an alteration, and that the effect of such a repeal would be to restore the common-law remedies. But the question has never been raised. Where the power is delegated by a special Act, which is in terms subject to all the provisions of the general Act, and adopts its remedies, a repeal of the general Act will not operate as a repeal of the special Act also, and the statutory remedies for injuries authorized by the special Act remain in force.¹ In such a case it was held, accordingly, that an equitable action to abate would not lie after the repeal of the general Act.² The Legislature may alter the provisions of a special charter as to remedies for flowage, and provide new remedies.³

§ 592. Historically the Mill Acts may be divided into two classes, viz.: first, the earlier New England statutes and that of Wisconsin, of which the original is found in Massachusetts; and second, those prevailing in the Southern and Western States, of which the original is found in Virginia. In some of the more recent statutes, provisions from both systems are combined. Statutes of the Massachusetts or New England system authorize the building of dams and the flooding of lands by persons desiring to build and maintain mills, and prescribe a remedy to be pursued by persons injured thereby. Statutes of the Virginia system empower the mill-owner to obtain the right to flow lands by proceeding in the manner and performing the conditions prescribed by the statutes. The fundamental difference in the systems is, therefore, in the lodgement of the initiative in the proceedings.

§ 593. The Mill Acts, like other statutes, have force only within the territory of the State enacting them. It follows

medium of the mill-owner, and that his holding is dependent on the will of the government. This is followed in *French v. Owen*, 5 Wis. 112.

¹ *Wood v. Hustis*, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 449.

² *Crosby v. Smith*, 19 Wis. 449.

³ *Pick v. Rubicon Co.*, 27 Wis. 433.

that for any extra-territorial injuries caused by dams and works maintained within the State, the same remedies apply as if there were no statute.¹ So, on the other hand, the Acts for the encouragement of mills apply only to mills within the State. If lands in such State are injured by mills or dams situated without the State, the mill-owner is not entitled to the benefit of the statute. For injuries in both these cases the remedy is at common law in the courts of the State where the injured property lies. Where a State cedes a portion of its territory, and the jurisdiction over it, to the United States, that territory is governed by the laws of the United States. Therefore, if a Mill Act is in force in such State, it will not apply to mills maintained upon the land ceded to the United States; nor, on the other hand, will the Mill Act authorize the flowage by a mill within the State, of lands within the territory ceded.² But where the United States simply holds the title to lands within the State, the State may exercise the right of eminent domain over such lands, and the laws of the State, including such statutes as the Mill Acts, apply to such lands.³

§ 594. The proceedings under the Massachusetts Mill Act are not founded upon any common-law writ, but are purely statutory.⁴ The present statute⁵ authorizes mill-owners to maintain dams subject to its provisions, and provides that

¹ *Wooster v. Great Falls Manuf. Co.*, 39 Maine, 246; *Salisbury Mills v. Forsaith*, 57 N. H. 124. So in the case of a canal company chartered by the State of Rhode Island, and whose works injured property in Massachusetts, it was admitted by the company that the charter gave them no right to commit such injury. *Farnum v. Blackstone Canal Co.*, 1 Sumner, 46. See remarks of Story, J., p. 57.

² *United States v. Ames*, 1 Wood. & M. 76.

³ *Boggs v. Merced Mining Co.*, 14 Cal. 279, 375; *Hendricks v. Johnson*, 6 Porter, 472.

⁴ Act of 1714; Ancient Charters, p. 404, c. CXI., providing for complaint by the party injured to the court of general sessions, and the appraisal of yearly damages by a jury; which should bar any action save that of debt, for the recovery of such yearly damages "from the owner or occupant of such mill, assessed as aforesaid, during the time of such flowage." Act of 1795; 2 Perpetual Laws (1801), c. 74, p. 344; St. 1825, c. 153; Rev. Sts. 1836, c. 116; Gen. Sts. c. 149.

⁵ Public Statutes (1882), c. 190.

any person whose land is overflowed or *otherwise* injured may obtain compensation by proceeding according to the Act. The statute is limited to injuries to the complainant's land caused by flowage.¹ It extends to injuries caused by reservoir dams,² including injuries to land intervening between the reservoir and the mill,³ but not to a reservoir dam upon one stream supplying power to a mill upon a different stream.⁴ It does not include injuries by tide-mills.⁵ The present statute provides that the jury may consider damages to other lands than those overflowed. Injuries caused by flowage below the dam are within its provisions;⁶ increased flowage caused by enlarging the mill and proportionally increasing the height of the dam is a new taking within the statute.⁷ An injury caused by flooding a cellar is within the statute, and not remediable at common law.⁸ A complaint cannot be entertained under the Mill Act for injuries

¹ *Palmer Co. v. Ferrill*, 17 Pick. 58, 66, where the injuries for which the action lies, and the benefits which may be set off, are limited to those caused by flowage. The same doctrine is adhered to in *Wisconsin. Brower v. Merrill*, 3 Pin. (Wis.) 46. As to injuries not within the Act, and remediable at common law, see *ante*, § 580.

² *Wolcott Woollen Co. v. Upham*, 5 Pick. 292; *Shaw v. Wells*, 5 Cush. 537. And see *Nelson v. Butterfield*, 21 Maine, 220; *Dingley v. Gardiner*, 73 Maine, 63. A dam at the beginning of an unnavigable outlet of a navigable lake is within the protection of the Wisconsin statute. *Clute v. Briggs*, 22 Wis. 607.

³ *Drake v. Hamilton Woollen Co.*, 99 Mass. 574; *Norton v. Hodges*, 100 Mass. 241.

⁴ *Bates v. Weymouth Iron Co.*, 8 Cush. 548.

⁵ *Murdock v. Stickney*, 8 Cush. 113.

⁶ *Gile v. Stevens*, 13 Gray, 146.

⁷ *Johnson v. Kittredge*, 17 Mass. 76; *Leonard v. Schenck*, 3 Met. 357; see *Brady v. Blackinton*, 113 Mass.

238. Where a person has a right to maintain a dam at a certain height, it is no ground for complaint under the Mill Act, that, owing to the non-use of his mill, the water stands higher on complainant's land than it otherwise would. *Daniels v. Citizens Savings Institution*, 127 Mass. 534. In Wisconsin, injuries caused by the obstruction, collection, and deposition of drift-wood are held items of damage to be allowed for in proceedings under the Act. *Janssen v. Lammers*, 29 Wis. 88.

⁸ *McNally v. Smith*, 12 Allen, 455. And so *semble*, if water is set back through a cellar drain into a cellar. *Cotton v. Pocasset Manuf. Co.*, 13 Met. 429. Injury to lands not flowed, but merely rendered less valuable by reason of odors from adjoining flowed lands, was held too remote for recovery under the statute in *Eames v. New England Worsted Co.*, 11 Met. 570. But see the present provision of the statute, § 14, cited *supra*. Compare *Rooker v. Perkins*, 14 Wis. 79, *accord*.

to an unappropriated mill-site.¹ Injuries to highways were held not authorized by the general Act, and were remediable at common law;² but by the Act of 1873,³ a mill-owner who desired to maintain a dam in such a manner as to overflow a highway is authorized to apply to the county commissioners, who may order such alteration in the way as will enable him to maintain his dam without injury to the highway, and may order the petitioner to pay all damages sustained by any person or corporation by such alteration. But the statutory remedy will lie for an injury to a private way.⁴

§ 595. The statutory proceeding is by complaint filed in the Superior Court of the county where the land or any part thereof is situated.⁵ It is provided in section 39⁶ that two or more persons suffering damage from a mill-dam, whether jointly or separately interested in the lands injured, may join in a complaint, and their cases may be heard before the same jury, which may assess joint or several damages as the interest and title of the complainants may require. The language is permissive, but when co-tenants are so injured, they will be required to join. The permissive rule that they "may join" in actions for trespass or nuisance was construed "must join" by Shaw, C. J., in *May v. Parker*,⁷ for the reason that the damages survive to all, which is equally true in this case; and it has been so ruled under the statute of Maine.⁸

¹ *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 43.

² *Calais v. Dyer*, 7 Maine, 155; *Monmouth v. Gardiner*, 35 Maine, 247.

³ St. 1873, c. 144; Pub. Sts. 1882, c. 190, § 42. A town within whose limits a highway has been changed under this section, and which has no ownership in the soil of the way, is not a person or corporation entitled to damages under this provision. *Cheshire v. Adams Reservoir Co.*, 119 Mass. 356.

⁴ *Calais v. Dyer*, 7 Maine, 155; *Monmouth v. Gardiner*, 35 Maine, 247.

⁵ If the land lies partly in several

counties, or if injuries are done to several parcels belonging to the same persons, but lying in different counties, the complaint may be filed in the court for either county. *Bates v. Ray*, 102 Mass. 458.

⁶ Pub. Sts. (1882), c. 190, § 39; Gen. Sts. c. 149, § 44.

⁷ *May v. Parker*, 12 Pick. 34. See *Bacon Abr. Joinder Tenants*, etc., K.

⁸ *Tucker v. Campbell*, 36 Maine, 346; *Moor v. Shaw*, 47 Maine, 88; *Phillips v. Sherman*, 61 Maine, 548. The Maine statute (Rev. Sts. 1871, Title 9, c. 92) contains no provision on joinder of parties. In *Phillips v. Sherman* it was held that the non-

A mortgagor in possession of the land injured may maintain a complaint under the Act without joining the mortgagee,¹ and may recover against the mortgagee;² and a land-owner may, after conveying the land away, recover under the statute for injuries to the land during his ownership.³ So a person in possession under a defeasible title,⁴ and a widow holding by devise a life estate in her late husband's lands,⁵ have been held entitled to recover. So a purchaser of land is held entitled to the remedy, for damage done after his purchase, by flowage begun before, unless the right perpetually to flow has been acquired, the original flowing not constituting a disseisin.⁶

joinder of a plaintiff could be taken advantage of under the general issue, by a brief statement denying the ownership, and that possession under claim of title was not a sufficient interest to enable the plaintiff to maintain his complaint. But a quit-claim deed to the plaintiff is held *prima facie* proof of ownership without proof of entry. *Williamson v. Carlton*, 51 Maine, 449. That part owners cannot maintain an action alone, but that complainants must have the entire title, see *Davis v. Stevens*, 57 Maine, 593; *Webster v. Holland*, 58 Maine, 168.

¹ *Paine v. Woods*, 108 Mass. 160.

² *Vaugh v. Wetherell*, 116 Mass. 138.

³ *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Turner v. Whitehouse*, 68 Maine, 221.

⁴ *Charles v. Monson Manuf. Co.*, 17 Pick. 70.

⁵ *Howe v. Ray*, 110 Mass. 298.

⁶ *Charles v. Monson Manuf. Co.*, 17 Pick. 70; *Craig v. Lewis*, 110 Mass. 377. In *Ballard v. Ballard Vale Co.*, 5 Gray, 468, the company, having the right to flow land to a certain height, wrongfully increased the height of their dam and the extent of flowage. The owner then sold the land and took a mortgage back for the purchase money. The purchaser by a

quit-claim deed conveyed to the company for a valuable consideration all his right in the lands flowed. The vendor afterwards entered for breach of condition, foreclosed the purchaser's equity of redemption, and then brought a complaint under the Act for damages accruing from the flowage after the entry. He was held entitled to recover. In *Newell v. Smith*, 15 Wis. 101, the purchaser of land already flowed, for which no compensation in gross had ever been made to the former owner, was held entitled to the remedy. This was doubted in *Pick v. Rubicon Co.*, 27 Wis. 433, and the following rule established. The person who owns the land at the time the right to flow vests in the mill-owner has the right to recover damages for perpetual flowage. If he sells the land, he retains that right, and the vendee will have no right of action for subsequent flowage. Under the Mill Act the right to flow vests whenever the mill-owner chooses to flow, and is divested only by his failure to pay the damages assessed. Under the general Mill Act the vendor of land flowed at the time of sale therefore retains the right of action for damages caused by perpetual flowage. This part of the ruling was directly affirmed in *Mead v. Hein*, 28 Wis. 533. But under the

§ 596. Under the Maine statutes, one holding a fee, liable to be defeated by the non-performance of a condition subsequent, shows sufficient title against a stranger flowing his land.¹ Under the Wisconsin Mill Act the plaintiff is required to state his interest. It is held that one who holds the legal title, and his purchaser in possession under a contract entitling him to a deed upon full performance of its conditions on his part, may join in an action for flowage, and the court may apportion the damages.²

§ 597. The complaint may be maintained against any person owning or occupying the premises upon and for which the dam is maintained. So the mortgagee in possession is

special charter involved in *Pick v. Rubicon Co.*, the right of flowage did not vest in the mill-owner until proceedings had been begun for determining the right and compensation. The vendor sold the lands flowed before the proceedings were begun, and, therefore, the right of action was held vested in the purchaser. But in *Sabine v. Johnson*, 35 Wis. 185, the rule in *Mead v. Hein*, and the doctrine advanced in *Pick v. Rubicon Co.* were distinctly overruled, and the rule laid down that the grantor of lands which are flowed at the time of sale by means of a mill-dam lawfully maintained, but in respect to which no proceedings to assess damages have been maintained, is entitled only to such damages as have accrued at the time of sale, unless he specially reserves future damages; and that the purchaser is entitled to recover for damages after the sale. Where the plaintiff averred that he had been, for three years preceding, the owner in fee and actually possessed of certain lands therein described, and that during all that time he had the right to the use and profits of said lands, and that the defendant had for the last three years flooded such lands, the complaint was held sufficient without averring that he owned the land

when the dam was erected. *Faville v. Greene*, 12 Wis. 11. Where proceedings to recover compensation have been had, and, after a sale of the property flowed, unforeseen injuries result, the purchaser can recover for such injuries in an action on the case. *Denslow v. New Haven & Northampton Co.*, 16 Conn. 98.

¹ *Webster v. Holland*, 58 Maine, 168. So the defendant charged with flooding lands by a dam must be alleged and proved to be owner or in possession of the dam causing the injury. A deed to him from one not shown to have had title is not sufficient evidence of such ownership, where an older outstanding title is proved in a third party; and in the absence of evidence, possession will be presumed to follow the superior title. *Sideling v. Hagar*, 41 Maine, 415. And where the issue involves the title to the premises flowed, a judgment will be conclusive between the parties and their privies to the estate, and is decisive of the question if raised in a subsequent suit. A title acquired after action is begun cannot be introduced to defeat the claim of the demandant. *Chick v. Rollins*, 44 Maine, 104.

² *Seymour v. Carpenter*, 51 Wis. 413.

held liable,¹ though he did not enter for the purpose of foreclosure.² A party having the record title, although he has conveyed the premises away by an unrecorded instrument;³ a former owner, for damage accruing during his ownership;⁴ a lessor, for damages caused by a dam built by his lessee for years;⁵ a lessee;⁶ a married woman, in whose name premises are held, though the dam is maintained by her husband;⁷ a corporation maintaining a dam, but not the stockholders individually, where the charter does not subject them to personal liability,⁸ all are chargeable either as owners or occupants of the premises on which the dam is maintained.⁹ A

¹ *Fuller v. French*, 10 Met. 359; *Lowell v. Shaw*, 15 Maine, 242.

² *Abbott v. Upham*, 13 Met. 172.

³ *Hennessey v. Andrews*, 6 Cush. 170.

⁴ *Walker v. Oxford Woollen Manuf. Co.*, 10 Met. 203; *Charles v. Monson Manuf. Co.* 17 Pick. 70; *Bean v. Hinman*, 13 Maine, 480.

⁵ *Sampson v. Bradford*, 6 Cush. 303.

⁶ *Davis v. Brigham*, 29 Maine, 391. See *Nelson v. Butterfield*, 21 Maine, 220, 237.

⁷ *Brigham v. Holmes*, 14 Allen, 184.

⁸ *Norton v. Hodges*, 100 Mass. 241.

⁹ Whether the defendant is a mill-owner or occupier within the act is a question of law for the court. *Large v. Orvis*, 20 Wis. 696. A mill-owner was not chargeable under the act of 1795, c. 74, for damage done by flowing before his title began. *Holmes v. Drew*, 7 Pick. 141. So in Wisconsin, it is held that the judgment should not include damages prior to the acquisition of title by the defendant. And if several defendants acquired title at different times, damages should be assessed from the date of the oldest title, not exceeding three years prior to the beginning of suit. *Sabine v. Johnson*, 35 Wis. 185. It is here held that there is no means of apportioning damages between such defendants. Persons rightfully maintaining a dam at a certain height, whose pond is

crossed by a highway, are not liable under the statute to the owner of land above the highway for flowage caused by an obstruction placed in the stream by a lessee of their grantors, who changed the location of the highway and obstructed the sluiceway conducting the stream under it. And their failure to remove the obstruction or restore the highway is not a continuance of a nuisance making them liable at common law. *Stetson v. E. Carver Co.*, 97 Mass. 402. Under the statute of Maine, it has been held that all the owners and co-tenants of the dam or mill causing the injury should be joined as defendants, and that the omission of one holding an interest in the dam and mill will be ground for a plea in bar. *Hill v. Baker*, 28 Maine, 9; *Turner v. Whitehouse*, 68 Maine, 221. But the complainant will be permitted to amend and summon in the other defendants. *Moor v. Shaw*, 47 Maine, 88. Where the proprietor of land flowed by a dam owned by several different persons instituted separate suits and recovered separate judgments against each, and afterwards one of the respondents became sole owner of the dam, it was held that where the land-owner brought a second suit to increase his yearly damages, he might combine the whole subject-matter in one complaint against the owner of the whole

subsequent purchaser is liable for the yearly damages becoming due and payable after his purchase.¹ But a person not owning or occupying the dam, but incidentally benefited by its maintenance, cannot be made liable under the Act for injuries caused by it.²

§ 598. The complaint must contain such a description of the land alleged to be flowed or injured, and such a statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.³ It must allege that flowage was caused by the defendant's dam, for the purpose of furnishing power for a mill.⁴

dam at that time. *Jones v. Pierce*, 16 Maine, 411. Where the respondents, severally owning water-mills on a stream, and owning as tenants in common and jointly maintaining a dam across the stream, on their own land, to supply power to their mills, they may properly be joined in a complaint for flowage by the dam. But the complaint must allege that the respondents erected and maintained water-mills on their own land. *Goodwin v. Gibbs*, 70 Maine, 243. *Norton v. Hodges*, 100 Mass. 241.

¹ *Lowell v. Shaw*, 15 Maine, 242. The beginning of each year is reckoned from the filing of the complaint. *Bryant v. Glidden*, 36 Maine, 36. Under the Massachusetts statute, the annual damages for the first year become recoverable by action, if not paid within three months from the election of the land-owner to take annual damages instead of the gross sum. (Pub. Sts. c. 190, §§ 20, 21.)

² *Nelson v. Butterfield*, 21 Maine, 220.

³ Pub. Sts. (1882), c. 190, § 5. A general description of the land was formerly sufficient. *Commonwealth v. Ellis*, 11 Mass. 462. And see *Paine v. Woods*, 108 Mass. 160.

⁴ *Slack v. Lyon*, 9 Pick. 62. It is not removable by affidavit, under the

Practice Act of Massachusetts, to the Supreme Court. *Humphrey v. Berkshire Woollen Co.*, 10 Allen, 420. See *Tyler v. Beecher*, 44 Vt. 648. Under the Maine statute for 1821, c. 45, it is held that the complainant must allege that the respondent has erected a water-mill "on his own land, or the land of another, with his consent" (following the words of the statute), or the complaint will be bad in substance, and a judgment thereon arrested. The Act of 1841, c. 126, omitted the references to ownership and the consent of the owner, and both these allegations became unnecessary. *Prescott v. Curtis*, 42 Maine, 64. In the Act of 1857, the provision for a mill on another's land was omitted. It is held under this Act that the complaint must allege the defendant's ownership of the land on which the dam is erected, or it will be demurrable. *Jones v. Skinner*, 61 Maine, 25. In Wisconsin it is held that the complaint need not deny in advance the defences which are open to the defendant, as that compensation has been made. *Faville v. Greene*, 12 Wis. 11. But the complaint must allege that the stream was unnavigable, to show that the injuries are within the provisions of the statute. *Waller v. McConnell*, 19

§ 599. The statute provides for a twofold trial: first, in the court, of the right of the complainant to have a jury summoned to inquire into the damages caused; and second, a trial before the sheriff's jury, of the question of damages. The defendant must plead in court any matter in bar of the complainant's right to have the inquiry;¹ as a release, or misdescription in the complaint,² a presumptive right,³ a contract right,⁴ and all matters pleadable in bar will be determined by the trial in court, and if settled for the complainant, and a jury is called, cannot be considered in the trial of damages.⁵ The question whether the land is damaged, as alleged, cannot be tried at the bar of the court, but must be left to the sheriff's jury.⁶ If the respondent pleads

Wis. 417. The complaint is amendable as to the description of the land. *Sabine v. Johnson*, 35 Wis. 185. And the pleadings under the Act are, in general, liberally construed. *Zeidler v. Johnson*, 38 Wis. 335.

¹ Pub. St. c. 190, § 8; *Vandusen v. Comstock*, 3 Mass. 184; *Lowell v. Spring*, 6 Mass. 398.

² *Darling v. Blackstone Manuf. Co.*, 16 Gray, 187.

³ *Wilmarth v. Knight*, 7 Gray, 294; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301.

⁴ *Howard v. Locks and Canals*, 12 Cush. 259.

⁵ *Charles v. Porter*, 10 Met. 37.

⁶ *Nutting v. Page*, 4 Gray, 581; *Charles v. Porter*, 10 Met. 37; *Prescott v. Curtis*, 42 Maine, 64. The defendant may plead the general issue with a specification of defence. *Howard v. Locks and Canals*, 12 Cush. 259. If the defendant pleads the general issue, with a specification of defence, he is confined to the specification. *Tyler v. Mather*, 9 Gray, 177. Where any one of the several defendants has the right to flow the land in the manner charged, the complaint cannot be maintained. *Butler v. Huse*, 63 Maine, 447. If a party flowing the lands afterwards acquires title to the land flowed, the right to

damages is thereby extinguished, and will not revive by a subsequent sale of the dam and mill. *Hathorn v. Stinson*, 10 Maine, 224. A contribution to the flowage by other dams is no defence to a complaint under the Mill Act. *Jones v. United States*, 48 Wis. 385. If the defendant justifies his flowage under the statute, he must aver compliance with the statute, and that compensation has been made. *Thien v. Voegtlander*, 3 Wis. 461. An award as to past damages, or a judgment on such award, is no bar to a complaint under the Act for subsequent damages. *Staple v. Spring*, 10 Mass. 72. Nor is an award for future damages for maintaining a dam at a certain height a bar to a complaint for damages caused by increasing the height. *McClellan v. Fisher*, 16 Gray, 185. An award that certain damages be paid by a certain time will not avail as a defence against a complaint to a respondent who failed to pay within the time, nor to his wife in whose name he took a conveyance of the mill-site. *Brigham v. Holmes*, 14 Allen, 184. An oral release operates as a license; is good against the licensor; but does not bind his grantee. *Stevens v. Stevens*, 11 Met. 251; *Seymour v. Carter*, 2 Met. 520; *Smith v. Goulding*, 6 Cush. 154; *Short v. Woodward*,

against the complaint, the further pleadings, issue, and trial in court proceed as in civil actions;¹ and on default or determination of the issue for the complainant, the court issues a warrant for a sheriff's jury, to hear and determine the matter of the complaint.² The jury are authorized to determine the height at which the dam may be maintained;³ whether

13 Gray, 86; *Clement v. Durgin*, 5 Greenl. 9; *Seidensparger v. Spear*, 17 Maine, 123; *Snow v. Moses*, 53 Maine, 546. Written releases, not under seal, are held not to bind the grantees, and do not bar their complaints. *Craig v. Lewis*, 110 Mass. 377; *Cobb v. Fisher*, 121 Mass. 169. Where the complainant mortgaged his property pending the complaint, and then executed a release under seal, of all past and future claims, in pursuance of which the complaint was entered "neither party," the release was held to bind the lands in the hands of a foreclosure purchaser, though neither he nor the mortgagee had notice thereof at the time of acquiring title. *Isele v. Schwamb*, 131 Mass. 337.

¹ If several persons file different complaints at the same time for injuries by the same dam, the complaints should be tried together by the same jury. *Richardson v. Curtis*, 2 Cush. 341; *Wilmarth v. Knight*, 14 Gray, 112. But injuries to a tract of land by different dams, owned by different persons, cannot be joined in one complaint. *Lull v. Fox & Wisconsin Co.*, 19 Wis. 100.

² Or the parties may by stipulation have a trial by jury in the Superior Court. Pub. Sts. (1882), c. 190, § 13.

³ Unless the height of the dam is conclusively fixed by a verdict, an award, or a binding agreement, a mill-owner has the right under the statute to adapt his dam to the needs of his mill, and to build it to such height as he pleases, subject to the liability to pay damages, and to have a jury fix the height at which it may be maintained by proceedings under

the statute. *Brady v. Blackinton*, 113 Mass. 238. The verdict is not defective for failing to fix and state the proper height for the dam. The existing or proposed height is held allowed, and presumed capable of proof outside the verdict. *Sabine v. Johnson*, 35 Wis. 185; *Aken v. Parfrey*, 35 Wis. 249. An award by arbitrators, or a finding by a jury authorizing the mill-owner to "raise the water" to a certain height, refers to the height of the water at that mark, and not to the height of the dam. *Winkley v. Salisbury Manuf. Co.*, 14 Gray, 443; *Hiscox v. Sanford*, 4 R. I. 55. These cases were decided by the language of the award and finding. Where the height of water is fixed by a conveyance or other instrument, the height in ordinary stages of water is referred to. *Brady v. Blackinton*, 113 Mass. 238. Where the height of the dam is fixed, the height of the dam in good repair is intended. *Voter v. Hobbs*, 69 Maine, 19. For decisions giving this rule where the height of the dam was determined by other means than by a finding, see *Bliss v. Rice*, 17 Pick. 23, 33; *Cowell v. Thayer*, 5 Met. 253; *Ray v. Fletcher*, 12 Cush. 200; *Jackson v. Harrington*, 2 Allen, 242; *Vickerie v. Buswell*, 13 Maine, 289; *Lacy v. Arnett*, 33 Penn. St. 169; *Marcy v. Shults*, 29 N. Y. 346; *Winnipisogee Lake Co. v. Young*, 40 N. H. 36. See *Alder v. Savill*, 5 Taunt. 454. *Contra*, see *Burnham v. Kempton*, 44 N. H. 78, 90; *Smith v. Ross*, 17 Wis. 227. Where a grant of the right to flow referred to a mark as a measure of height, and no such mark existed

it shall be left open during any part of the year, and if so, how long; to assess the past damages for the three years next preceding the institution of the complaint, and to the time of rendering the verdict; to set off benefits caused by the dam to the complainant's lands by the flowage; to determine the amount to be annually paid by the respondent to the complainant for the future annual damages to be caused by the dam; and also a sum in gross, which would be a just compensation for all damages thereafter to be caused, and for the right of maintaining the dam forever.¹ The complainant may then elect, at any time within three months from the allowance and recording of the verdict, to take the gross sum or the annual allowance.² If the gross sum is

at the time, one fixed nineteen years afterward cannot be shown by parol to occupy the place intended. *White v. Bliss*, 8 Cush. 510. A finding authorizing a petitioner to raise the water three feet above the height at which it was raised by his dam on a day named, has been held sufficiently certain. *Todd v. Austin*, 34 Conn. 78. See *Town v. Faulkner*, 56 N. H. 255, where it is held, under New Hampshire Act, that the measure of damages is not determined by the height of the dam, but by the height to which the water is authorized to be raised.

¹ In estimating the damages, the jury are to compare the present value of the land, as a whole, with what its value would have been if it had not been flowed, regard being had to the injuries caused by the flowing. *Palmer Co. v. Ferrill*, 17 Pick. 58; *Bates v. Ray*, 102 Mass. 458; *Howe v. Ray*, 113 Mass. 88. See *Pick v. Rubicon Co.*, 27 Wis. 433. Where the verdict was for past damages up to the time of action begun, and for annual damages, after the trial, omitting the damages which accrued during the suit, the amount of such damages was reckoned for the length of time elapsed, on the basis of the

annual damages, and the verdict was sustained. *Newton v. Allis*, 16 Wis. 197.

² An acceptance of the gross sum bars all right of action for future flowage of the lands in question by any one. *Chase v. Sutton Manuf. Co.*, 4 Cush. 152; *Heard v. Talbot*, 7 Gray, 113. A life tenant is entitled to future damages and to gross damages. *Howe v. Ray*, 110 Mass. 298. It was held, upon the complainant's electing to take damages in gross, that the respondent might abandon his right to flow, take down his dam, and avoid liability for future damages. *Hunt v. Whitney*, 4 Met. 603; *Blackwell v. Phinney*, 126 Mass. 458. The same rule prevails in Wisconsin. *Aiken v. Mills*, 29 Wis. 322. So in North Carolina, if the dam is altered or taken down, this will be ground for reducing the annual damages on a writ of *audita querela*. *Gillet v. Jones*, 1 Dev. & B. 339. When the respondent's exceptions are carried to the Supreme Court, and there overruled, after the verdict is returned and accepted, the verdict is held not to be allowed until the overruling of the exceptions. *Hamilton v. Farrar*, 131 Mass. 572. In *Darge v. Horicon Iron Co.*, 22 Wis. 417, it is held that the award for past damages and gross

chosen, it must be paid within three months, or the respondent will lose the benefit of the Act so long as the sum is unpaid; and the complainant is entitled to judgment and execution on the verdict for past damages. If no election is made and recorded within the three months, the statute provides that the annual compensation will become due and payable (as if it had been elected) to the complainant and those claiming under him, so long as the dam is maintained; the person entitled to compensation is given a lien on the mill and dam, for payment of the compensation for the three years prior to suit therefor. He may maintain an action of contract to recover such sum for the three years preceding the suit, and enforce his lien against the person who owns or occupies the mill when the action is brought, and may have the premises sold on execution, subject to a right of redemption within one year.¹ A new trial may be granted in this action, as in civil actions generally.

§ 600. If either party becomes dissatisfied with the annual compensation established, a new complaint may be brought for the increase or diminution of such compensation, or for ascertaining the gross damages, as before; but if the complainant declined to accept gross damages awarded to him, they cannot be again awarded until the expiration of ten years from the former award.² Such new complaint may be

damages for the future may be in one gross sum.

¹ It is no defence to such action that the mill and dam are destroyed, if the defendant has not abandoned his right to flow. Nothing short of an abandonment of his right to flow will terminate the liability to answer therefor. *Fuller v. French*, 10 Met. 359. If such action to recover the damages assessed is brought jointly against the person who occupied it when the action was brought, the plaintiff may amend by discontinuing as to the former. *Fitch v. Stevens*, 2 Met. 505.

² The complaint must set forth the

former complaint and proceedings, or it will be treated as an original complaint. *Vandusen v. Comstock*, 9 Mass. 202; *Ray v. Fletcher*, 12 Cush. 200. And where the complainant alleged an increase in the height of the dam, and also wished to obtain a review of the former assessment, it was held that an allegation of dissatisfaction was necessary to make the complaint sustain a verdict for annual and gross damages which was larger than the preceding. Without such an allegation, the complaint might be treated simply as an original one for the damage caused by the increased height. *Leonard v. Schenck*, 3 Met.

maintained by and against either of the parties to the original suit, or by and against a person lawfully holding under either of them, but no such complaint can be brought until the expiration of one month after the payment of the then last year has fallen due.¹ A finding on the original complaint that the complainant is not entitled to damages is no bar to a new complaint for damages alleged to have arisen after the former verdict, and for compensation for damages thereafter sustained.²

§ 601. The statute of Wisconsin is almost an exact copy of that of Massachusetts.³ The principal difference is that the remedy provided is by "a civil action";⁴ that the case

357. See *Johnson v. Kittredge*, 17 Mass. 75, which holds that a complaint for such increase is good. The judgment on the original complaint, that the respondent has no right to maintain a dam without paying damages, estops him from pleading to the second complaint, a right by prescription or grant, previous to the judgment. *Adams v. Pearson*, 7 Pick. 341. The defendant cannot deny the increased damage by a plea in bar. This must be determined by the sheriff's jury. *Ibid.* The statute makes no provision for reassessment of gross or annual damages against a mill-owner for flowing lands after the land-owner has elected to take the gross damages, and neither party can maintain a complaint for that purpose. The mill-owner can maintain a complaint for reassessment of annual damages only when he is liable for such damages under an existing judgment. He, therefore, cannot maintain such a complaint when the land-owner has elected the gross damages. *Stevens v. Fitch*, 2 Met. 507. So in Wisconsin, the plaintiff accepting gross damages is held estopped from questioning the height of the dam. *Aken v. Parfrey*, 35 Wis. 249.

¹ The effect of this provision is to suspend the complaint for one year

and one month following the time comprised in the prior decision. *Staple v. Spring*, 10 Mass. 72, 77; *Stevens v. Fitch*, 2 Met. 507, 508. The time comprised in the prior decision is, under the present act (§ 16), for past damages up to the time of rendering the verdict. Such complaint, therefore, cannot be brought until after the first yearly payment has been made. Under the statute of Maine, the damages, past and future, are assessed in yearly sums, and the judgment includes the sum due on the date of its entry, viz., the last day of the preceding term, and the new complaint cannot be brought until one month after payment of the yearly sum next falling due. *Billings v. Berry*, 50 Maine, 31. In both cases the judgment is conclusive for the amount of yearly damages for the year succeeding the time comprised in the former decision.

² Pub. Sts. c. 190, § 36. But it is considered by Sewell, J., in *Staple v. Spring*, 10 Mass. 72, 77, that the postponement of a second action for one year and one month (under the present section 31) applies to this case also.

³ Wis. Rev. Sts. (1878) 78, c. 164. See *Kearns v. Thomas*, 37 Wis. 118.

⁴ Rev. Sts. (1878) 78, c. 146, § 3377. The action is legal and not equitable.

is tried before a jury at the bar of the court;¹ and therefore the distinction between issues which must be presented to the court and issues for the jury does not affect the order of pleading. The defendant is not, as in Massachusetts, forbidden to deny by his pleading the allegations of injury in fact.² The verdict in the action may be set aside and a new trial ordered, as in other cases, and an appeal may be taken from any final judgment rendered therein, in like manner and with like effect as in other civil actions.³ The statute of Maine⁴ is substantially like that of Massachusetts, and the rulings upon the latter have generally been followed in construing the former. The principal differences in the Maine statute, resulting from subsequent legislation, are the following: 1. It authorizes mill owners to dig canals upon their own land, not exceeding one mile in length, and thereby divert the water of unnavigable streams to their mills, upon making compensation, to be ascertained by the same form of procedure as in the case of flowage. 2. It does not provide for other injuries than those caused by such flowage and diversion. 3. It directs the appointment of three commissioners, by whom the damages are to be appraised, and the height and period for maintaining the dam are to be determined, instead of by a sheriff's jury. On request of either party, a jury may be impanelled to try the cause at the bar of the court; and the report of the commissioners shall then be given in evidence to the jury. The report will be conclusive evidence until impeached, and it may be impeached only for misconduct, partiality, or unfaithfulness on the part of some commissioner.⁵ 4. The commissioners are not em-

Bevier *v.* Dillingham, 18 Wis. 529;
Kearns *v.* Thomas, 37 Wis. 118.

¹ § 3380. A trial of all the issues of fact by one jury is (*semble*) sufficient. Kearns *v.* Thomas, 37 Wis. 118.

² § 3379.

³ § 3400. See Kearns *v.* Thomas, *supra*, which holds that appeals in the action were governed by the general statute of appeals prior to the passage of § 3400.

⁴ Maine Rev. Sts. 1871, Title 19, c. 92.

⁵ Rev. Sts. 1871, Title 19, c. 92, § 10; Bryant *v.* Glidden, 36 Maine, 36. It is a fatal defect in the report if it does not show that the parties were heard or notified to appear. Coleman *v.* Andrews, 48 Maine, 562. But objections to the complaint cannot be urged as reasons for not accepting the report. *Ibid.*

powered to assess a gross sum as compensation for permanent future damages. 5. The court may at discretion, on the complainant's motion, require the owner or occupant of the mill or canal property to give security for the payment of annual damages; and on failure of such owner or occupant to give security as required, he shall lose the benefit of the statute and become liable to an action at common law.¹ 6. If the restrictions upon the height of the dam or seasons during which lands may be flowed are violated by the mill-owner or occupant, he becomes liable to pay double damages, recoverable in an action at law.²

§ 602. The effect of flowage not causing actual damage has caused a difference of opinion between the courts of Maine and Massachusetts in the construction of their respective statutes. By the law of Maine, flowage not causing damage is held lawful, and no ground for complaint. Therefore if flowage not causing damage be continued for twenty years, it confers no right to flow lands and injure another, and is no bar to an action where damage results from the flowage.³ The adverse user begins at the time when actual damage is caused.⁴ In Massachusetts, on the other hand, flowage, though causing no actual damage, if continued for twenty years, without any complaint therefor, is held to be adverse, and confers the right to flow such land in future, without payment for any damages which may thereafter be caused.⁵ This difference may be explained in part by a difference in the wording of the statutes. The Maine statute of 1821, following the Massachusetts statute of 1795,⁶ provided: "It shall be lawful for the owner or occupant of such

¹ The Massachusetts statute of 1795, c. 74, contained a similar provision. And see *Stowell v. Flagg*, 11 Mass. 364.

² Rev. Sts. 1871, Title 9, c. 92, § 24.

³ *Tinkham v. Arnold*, 3 Maine, 120; *Hathorn v. Stinson*, 10 Maine, 224; s. c. 12 Maine, 183; *Seidensparger v. Spear*, 17 Maine, 123; *Nelson v. Butterfield*, 21 Maine, 220; *Wood v. Kelly*,

30 Maine, 47; *Wentworth v. Sandford Manuf. Co.*, 33 Maine, 547; *Burleigh v. Lumbert*, 34 Maine, 322; *Underwood v. N. Wayne Co.*, 41 Maine, 291.

⁴ *Burleigh v. Lumbert*, 34 Maine, 322.

⁵ *Williams v. Nelson*, 23 Pick. 141; *Ray v. Fletcher*, 12 Cush. 200.

⁶ 1 Laws of Mass. (Metcalf's ed.) 1801, p. 408, c. 74.

mill" (before described) "to continue the same head of water to his best advantage in the manner on the terms hereinafter mentioned." "If any person *shall sustain damages* in his lands by their being flowed as aforesaid, he may complain," etc.; and a similar provision has been retained in all the revisions.¹

¹ Laws of Maine, 1830, c. 45, § 2; Rev. Sts. (1841), c. 126, § 5; Rev. Sts. (1857), Title 9, c. 92, § 4; Rev. Sts. 1871, Title 9, c. 92, § 4. In the Massachusetts Revised Statutes of 1836, c. 116, the language of the Act of 1795 is changed. Section 4 reads: "Any person whose land is *overflowed*, or otherwise injured by such dam, may obtain compensation therefor," etc. This change was made three years before the case of *Williams v. Nelson* was decided. The point decided in the case is, therefore, simply that under the Massachusetts statute the complainant had a right of action which he had lost by failing to exercise it for twenty years. Shaw, C. J., did not, however, place the decision upon the words of the statute. He held in effect that the statute of 1795 was to be construed in the same way, and that the Maine doctrine was erroneous. The Maine decision went upon the ground that the user was no evidence of a grant because it was lawful and needed no grant. He replies that the grant pleaded was of the right to flow, paying no damage. The statute conferred only a right to flow, paying damage. The right asserted, therefore, went beyond that conferred by the statute. Such a right could only be accounted for by the presumption of a grant. The Maine case held that the user was not such as to be evidence of such a grant. Of this he says: "The case also goes on the supposition that to found the presumption of a grant, the enjoyment must be adverse, and of such a nature that but for the presumed grant it would be unlawful. It may

be deemed adverse, if in any degree it tend to impose any servitude or burden on the estate of another. But in many cases, as the enjoyment of air and light by the owner of a house, the act is not unlawful without a grant by the owner of the land over which they come; yet the enjoyment of such privilege for a long time, without obstruction or notice on the part of the owner of the adjoining land, is proof of a right, and may raise the presumption of a grant. The case of a mill-owner is in the same degree similar." The case of *Boston Manuf. Co. v. Burgin*, 114 Mass. 340, contains some statements seemingly in conflict with this. It was there held that the mill-owner did not acquire such an easement as would enable him to maintain a petition against the land-owner, to compel him to try his title. Wells, J., said: "Such exercise of the right of fowage is not the enjoyment of an easement in the land flowed. It is not adverse to the title or possession of the owner, and being permitted by law, and not actionable except by complaint for compensation, it will not ripen into title by lapse of time . . . The right to maintain the dam, and to keep up the head of water, is given to all mill-owners by statute. The fowage of adjacent lands is incidental, and compensation is made according to the degree of injury. But the right to occupy the surface of the land with the water is not taken, and the land-owner may exclude it if he sees fit to do so. And when the right of the mill-owner becomes absolute by paying gross damages, or by prescription, it is only a right to keep

§ 603. The common law gave an action to a property-holder for every abridgment of the free use of his property, although no present damage was caused thereby. Such abridgment was opposed to the holder's right, and became the foundation of an adverse right. Any flowage would be such an abridgment. But for an injury of this kind, the Act of 1795 and the statutes of Maine provide no remedy. The statute of Maine¹ provided that if the jury find that no damage is done to the complainant by flowing his land, the respondent shall recover his costs. The Act of 1795 contained no such provision, but its intent was the same. Parker, C. J., said in *Stowell v. Flagg*:² "The process is given only to those who have actually suffered damage." The meaning of the phrase "actual damage" under the statute plainly is present pecuniary damage, and not, as at common law, the damage implied in the infringement of a right. Shaw, C. J., suggested in *Williams v. Nelson*,³ that the land-owner "could maintain no action simply for erecting and keeping up the dam; but he could file and prosecute his claim for damages, or he could make his claim *in pais*, which, we think, would rebut the presumption of grant from mere use and enjoyment." The first suggestion, as applied to cases where no actual damage is suffered, is disposed of by the remark of Parker, C. J., cited above. The second suggestion, of a claim *in pais*, to prevent the operation of adverse uses, is not one of the recognized methods of defeating such a claim, and conflicts with the rule that adverse possession cannot avail to confer a right, if the owner cannot resist it at law.⁴ Under these statutes the land-owner was, there-

up the dam, without rendering compensation for such incidental injury."

¹ St. 1821, c. 45, § 8; Laws of Maine, 188, p. 146.

² 11 Mass. 364, 367.

³ 23 Pick. 141, 145.

⁴ Washburn on Easements (3d ed.), 163. In several cases, Shaw, C. J., suggested that the complainant could embank his land against the flowage. *Williams v. Nelson*, 23 Pick. 141, 143; *Murdock v. Stickney*, 8 Cush. 113,

116. See *Storm v. Manchaug Co.*, 13 Allen, 19, and *Boston Manuf. Co. v. Burgin*, 114 Mass. 340, to same effect. But this is not a legal remedy, the failure to exercise which would bar the plaintiff's right. He is not bound to resort to such means to protect his property. In *Felton v. Simpson*, 11 Ired. 84, the plaintiff's land had for twenty years been protected from flowage by means of a dam maintained upon a third person's land above him.

fore, without any remedy for the abridgment of his right. Upon these premises the Maine doctrine is founded. The land-owner cannot be held to have lost, by failing to pursue his remedy, that for which no remedy was given. And under the doctrine of *Stowell v. Flagg*, it would seem that this is the correct view of the law under the Massachusetts Act of 1795, and that the remarks of Shaw, C. J., are so far inaccurate. But under the provisions of chap. 116, § 4, of the Massachusetts Revision of 1836, for an action by any one whose lands are overflowed; and the provision for assessing damages in gross for perpetual flowage (enacted, Mass. St. 1829, chap. 122, § 2), the land-owner would always have a remedy, and could recover for future flowage, although no actual damage had yet accrued; and the Massachusetts decisions are therefore correct.¹

The defendant cut this dam, causing an overflow of the plaintiff's land, for which he brought suit at law. It was ruled below that he had acquired a prescriptive right to the protection. This was overruled above. Pearson, J., said: "To make this doctrine applicable, two things are necessary. There must be a thing capable of being granted; and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant." To the same effect, see *Grigsby v. Clear Lake Water Co.*, 46 Cal. 396, 406; *Parker v. Hotchkiss*, 25 Conn. 321. In the latter case the common-law rule, as to the actual injury caused by flowage, is, however, stated thus: "If, indeed, the plaintiffs, by means of their dam, had thrown the water back upon the defendant's land, and had continued to do so for a period of more than fifteen years, without objection on his part, the law would presume a grant to the plaintiffs of the right to flow the defendant's land, because it is not to be supposed that he

would have suffered such a continued injury to his land without objection unless the plaintiffs had acquired the right." That the taking of water from a stream under special statutory authority, is not in itself such an invasion of the rights of landowners along the stream as will enable them to maintain a claim for damages in the absence of any actual damage, see *Dwight Printing Co. v. Boston*, 122 Mass. 583. That limitations on action for injuries under the statute run from the time when actual damage is caused, see *Thornton v. Turner*, 11 Minn. 336; *Eastman v. St. Anthony Co.*, 12 Minn. 137, 143.

¹ Under the North Carolina statute, as we shall see *infra*, where flowage is shown, the land-owner is entitled to nominal damages though no actual damage is shown. *Wright v. Stowe*, 4 Jones, 516; *Little v. Stanback*, 63 N. C. 285. These cases are in accord with the Massachusetts rule. But in North Carolina, the act causing the injury is held a tort, and the statute is construed merely to provide a special remedy. The general rules regulating tortious user would therefore apply. *Wilson v. Myers*, 4 Hawks, 73.

§ 604. Under the Mill Act of Rhode Island,¹ any one injured by the flowage or stoppage of water may maintain an action on the case therefor. In this action the issue is tried and adjudged by the court whether the plaintiff is entitled to damages, and from its judgment both parties have the right of appeal. If the plaintiff is held entitled to damages, a jury is summoned to ascertain the amount thereof, under the direction of a judge of the Supreme Court. The jury are required to appraise past damages, future yearly damages, and future damages in gross. The plaintiff may elect between the yearly and gross damages, his election binding both parties and their successors forever. If no election is made, judgment is given for yearly damages; and the judgment for damages is a bar to all actions for the injuries complained of, except actions to enforce the judgment. If, after the plaintiff elects to receive the yearly damages, the mill-owner should remove the matter complained of in the writ, then the plaintiff or his assigns shall recover the amount of the yearly damages for five years after the removal, but no longer.² The officer serving the writ is required to file a copy thereof in the office of the town-clerk of the town in which the dam is situated; and from the time of such filing, the mill and dam, with the appurtenances and adjoining land, become pledged and liable for any damages which may be recovered in such action.³ The person maintaining the dam is required, at the request of the owner of any dam on the same stream, within one mile below, not to detain the natural stream at any one time more than twelve hours out of twenty-four, except on Sundays.⁴ The provisions of the act are expressly extended to, and embrace, lands, water-privileges, and water-rights taken to supply towns with water.⁵ The statute contains provisions for execution and sale under the judgment, for redemption within one year (twelve per cent. interest being added to the purchase price), for costs, and against abatement of the suit by the marriage or death of the parties.⁶

¹ Pub. St. (1882), c. 104, p. 279.

² *Ibid*, § 15.

³ *Ibid*, § 2.

⁴ *Ibid*, § 21.

⁵ *Ibid*, § 22.

⁶ Defences arising under conveyances may be asserted in such action, and are not grounds for equitable interference. *Wilbor v. Matheson*, 8 R. I. 166.

§ 605. There was no general Mill Act in New Hampshire, authorizing the flowage of lands by mill-owners, until 1868. The Act of 1868¹ contains several features of the Massachusetts Act, but differs from it and from the other Mill Acts in many important respects. It authorizes either party to take the initiative in the proceedings by petition to court, after the flowage or other injury has continued for thirty days, without an adjustment; provides for the reference of the petition to a committee of three disinterested persons, who shall hear the parties, view the premises, determine the extent, if any, to which the flowage and injury are for the public use, and necessary to the mill or mills for which they are designed, estimate the damages, and make report to the court. Before the reference of the petition, if either party so elect, the court is required to direct an issue to a jury to try the facts alleged, and assess the damages. Upon the return of the report of the committee, any person interested therein may object to its acceptance for any irregularity or improper conduct on the part of the committee. The court may set aside the report for any just and reasonable cause, "and if required, shall inquire for itself whether the erection of said dam is of public use or benefit, any finding of the committee upon that point notwithstanding; and if the court shall be of opinion that the erection of said dam is not of public use or benefit, the petition shall be dismissed." But if the report is accepted and established, the court is required to render judgment thereon, after adding fifty per cent. to the estimate of the damage; or if the issue is submitted to a jury, the judgment on the verdict must include an addition of fifty per cent. to the amount of damages assessed, which judgment shall be final.² It is specially provided that no person or corporation shall derive any title from these pro-

¹ See N. H. Gen. Laws (1878), Title 17, c. 141, §§ 15, 17, 19.

² A land-owner who filed the petition for the assessment of damages, but who is dissatisfied with the report, cannot by motion become nonsuited. *Pollard v. Moore*, 51 N. H. 188. It was objected in this case that there

was no provision for appeal or review. But the court held that this did not render the proceedings unconstitutional or invalid. There is no provision in the Act for a new trial, unless that cited in the text *supra* is intended to answer that purpose.

ceedings, or be discharged from any liability in relation to the premises injured, until he or it has paid or tendered the amount of the judgment. This provision reverses the rule laid down in the early case of *Lebanon v. Olcott*,¹ that where a mill company was authorized to flow lands, the damages need not be assessed or paid until after the flowage.² The assessment of damages is to include all damages, past and future, which may accrue from the acts alleged.³ There are no provisions for annual damages, suits upon the judgment, or reassessment. The proceeding is reduced to a single trial. In *Ash v. Cummings*, after construing the act, Sargent, J., says: "This construction of the Mill Act leaves the land-owner in possession of his constitutional rights, and gives him compensation before his property is destroyed or materially injured, as at common law before the passage of this Act; it enables the mill-owner to escape innumerable suits and endless litigation, by applying to have the damages assessed against himself for all future time, and all the past that has not been adjusted, by showing that his is a case in which private property ought to be taken for public use with compensation, thus giving abundant constitutional effect to the Act." In estimating and determining the extent to which the flowing or draining is of public use, the committee may fix the height of the dam, or may fix the height to which the water may be raised by any other monument; and the measure of damages is not determined by the height of the dam, but by the height to which the water is authorized to be raised.⁴

§ 606. The statute of Connecticut is recent, the first general statute upon the subject of flowage apparently being that passed in 1864.⁵ This act, which, with some amendments, constitutes the present law of the State,⁶ authorizes mill-owners to maintain dams upon their own lands, or other

¹ 1 N. H. 339.

² See *Ash v. Cummings*, 50 N. H. 591.

³ *Ash v. Cummings*, 50 N. H. 591, 619.

⁴ *Town v. Faulkner*, 56 N. H. 255.

⁵ Conn. Pub. Acts, 1864, c. 26. The

Act of 1838, which remains in force (Rev. Sts. 1875, Title 16, c. 7, part I., § 18) authorized the flowage of highways, upon the payment of damages to be assessed by the Superior Court upon a petition in equity.

⁶ Rev. Sts. 1875, Title 19, c. 17, Pt. 6.

lands with the consent of the owners; and to maintain ditches and raceways across the lands of others.¹ The procedure somewhat resembles that under the Virginia statute. The initiative is given to the mill-owner. He proceeds by petition, giving a description of the lands to be affected, and the dimensions and location of the work. The court is required to refer the petition to a committee of three disinterested freeholders of the county, who decide upon the public use of the work, and whose other powers and duties are similar to those of the commissioners in Maine.²

§ 607. The statute of Vermont is of recent date, and in many ways combines the advantages of both systems of Mill

¹ The fact that the dam in question has been before maintained under a license, is no bar to a petition. On the revocation of the license the mill-owner may maintain a petition. *Olmstead v. Camp*, 33 Conn. 551, 552. So the fact that he has already wrongfully raised, and is maintaining his dam at the height which in his petition he prays to have established, is no bar to his petition, although it may be ground for an action at law or an injunction. The mill need not be on the same tract of land as the proposed dam, and it is no objection that lands of third parties lie between the two tracts. *Todd v. Austin*, 34 Conn. 78. One maintaining a dam for the purpose of leasing power to others is protected by the statute. *Occum Co. v. Sprague Manuf. Co.*, 35 Conn. 496.

² By St. 1880, c. 92, § 1, mesne process upon flowage petitions, by a writ of summons, is provided. The owner of the mill is the proper person to maintain the petition. The fact that the mill is in the possession of a tenant at will who is not joined, is no objection. *Olmstead v. Camp*, 33 Conn. 532, 552. A petitioner may include in a single petition all persons as respondents who have lands that will be overflowed by the proposed pond. Residence of the land-owner in an-

other county is immaterial; and it is held immaterial that the land of one of the respondents lies wholly outside of the county in which suit is brought, if lands of other respondents are within the county. *Todd v. Austin*, 33 Conn. 87. Upon a petition to raise an existing dam to a greater height, a report authorizing additional height sufficient to raise water three feet above the height at which it stood on the day named was held sufficiently certain. *Todd v. Austin*, 34 Conn. 78. In *New Britain v. Sargent*, 42 Conn. 137, the city was authorized by a special Act to divert a stream for public purposes. The Act provided for the assessment of damages by a committee whose award should be final. The owner of a part of the stream, below the point of diversion, had formerly used it for mill purposes, and had a right to flow the land of a proprietor above him. It was held that the question of damages was one wholly of fact; that the committee were not bound to give the owner of such privilege what it would be worth if improved to its full extent, nor to measure the value of his flowage right by the gain to the proprietors above, in being relieved of the flowage; and that their finding could not be reviewed by the court.

Acts.¹ At the first adjudication upon the Act it was in effect held unconstitutional. The court held that no public duties were imposed on mill-owners by the Act, such as the duty of receiving and grinding grain for all who offered it, and therefore the taking contemplated would be not for public, but for private use.² But constitutional questions have been considered in another place.³ The court held incidentally that the county court had exclusive jurisdiction of proceedings under the Act, that a case could not be carried up to the Supreme Court by exceptions, but that questions involved in the proceedings could be brought before the Supreme

¹ Rev. Laws of Vt. (1880), c. 148. The present statute of Vermont is made up from Acts passed in 1866, 1867, and 1869, and these Acts include the first general legislation of the State upon the subject. The proceedings are begun by petition by the mill-owner, upon which the court appoints commissioners, whose powers are like those of the commissioners appointed under the Acts of Maine. The report is open to objection and liable to be set aside as under the other statutes, but, if accepted and established, it is conclusive in the matter, with this exception (§ 3221), "except that the court may inquire into the damages, and render judgment against the petitioner in favor of the persons interested in the lands for such damages as they sustain; and the court may set aside the report for any cause which appears just, and, if required, shall inquire for itself whether the erection or continuance of the dam, flume, or trunk, will be a public benefit, notwithstanding the finding of the commissioners, and if it finds that the public will not be benefited by such erection or continuance, the petition shall be dismissed." The Act authorized the erection and continuance of dams, flumes, or trunks, and the elevation of existing dams, for obtaining water from streams not navigable, to work mills or manufac-

tories erected on the miller's own land, or on the land of another by his consent, whereby the water should be carried or made to flow over or upon the lands of other persons. It contained several salutary provisions for the protection of property holders. It required the party desiring to maintain works for the benefit of a mill to petition the County Court before any injury was done for permission to erect the desired work (§ 3215); to give security for costs and for prosecuting his petition to effect (§ 3216); to pay or deposit the amount of damages assessed and costs for the persons entitled to the same, before the water should be flowed upon or conducted over or through the land (§ 3222); provided that no action should be maintained by the petitioner against the petitioner for the damages in question during the pendency of the petition, but that the court or judge before whom the petition is pending might order such security for damages to be given by the petitioner to the petitioner, as should be deemed expedient (§ 3222); and that if the cost and damages should not be paid within sixty days after the proceedings on the petition should be ended, the proceedings should be of no legal effect.

² *Tyler v. Beecher*, 44 Vt. 648.

³ See *Ante*, § 254.

Court by a writ of *certiorari*, *mandamus*, or other appropriate writ.¹

§ 608. The Pennsylvania statute is peculiar. It protects navigation and the passage of fish, but makes no provision for compensation to persons whose lands are flowed or damaged. By the statute of 1803,² owners of lands adjoining navigable streams are authorized to erect dams for mills or water-works,³ and should not obstruct navigation or the passage of fish. The statute provided that on complaint to the judges of quarter session that such obstruction was caused, the court should appoint three commissioners to inquire and report upon the state of the dam; that if it appeared that an offence was committed, the court should direct an indictment to be sent to the grand jury; and upon the prosecution of such offence to conviction, impose a fine not exceeding one hundred dollars upon the person maintaining such dam, and direct the supervisors of highways of the adjoining township to remove such obstruction and reduce the dam to conformity with the statute, at the offender's cost. The court may also direct a jury to assess the damages of the persons bringing the complaint.⁴ In 1841 an act was passed

¹ See *ante*, c. 13.

² Brightly's Purdon's Digest (10th ed.), p. 1065.

³ Possessors of such land are treated as owners under the Act, except as against those who claim by better titles. *Bigler v. Antes*, 21 Penn. St. 288. The statute excepts the Delaware, Lehigh, and Schuylkill rivers. It extends to streams subsequently declared highways. *Brown v. Commonwealth*, 3 S. & R. 273; *Coover v. O'Conner*, 8 Watts, 470. And to streams navigable at common law. *Ensforth v. Commonwealth*, 52 Penn. St. 320. It authorizes only works for the use of water-power, and not pools for rafts. *Commonwealth v. Church*, 1 Penn. St. 105. *Dubois v. Glaub*, 52 Penn. St. 238. As to navigable streams, the Act gives only a

license revocable when public interests may require. *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Ib. 9; *New York & Erie Railroad Co. v. Young*, 33 Penn. St. 175. But when extended to small streams by Acts making them public highways, it changes the remedy, but does not reduce owners or builders of dams to licensees. *Barclay Railroad Co. v. Ingham*, 36 Penn. St. 194. Indictments for offences under the Act must be brought in the method provided by it. *Commonwealth v. Plumer*, 1 Am. Law. Reg. 124.

⁴ If the person injured begins an action at common law, and subsequently makes complaint under the statute to have the dam abated by indictment, and no damages are given

which provided for compensation to owners or possessors of vessels or rafts delayed or damaged by such dams, to be determined by three persons appointed by a justice of the peace of the county where the dam is maintained, upon the application of the parties injured.¹

§ 609. The Virginia statute is the original of a series of statutes in force in the Southern and Western States. It differs in many ways from that of Massachusetts. The remedy provided is an adaptation of the writ of *ad quod damnum*.² The present law provides that the owner of

in the statutory proceeding, it is held that a conviction therein will not bar further pursuit of the action. *Gould v. Langdon*, 43 Penn. St. 365. But *quaere*, if the action is not barred altogether by the statute.

¹ Prior to the passage of this Act, damages were recoverable by an action on the case. *Bacon v. Arthur*, 4 W. 437; *Bell v. McClintock*, 9 *Ibid.* 119, and actions on the case have been allowed since its passage. *Plumer v. Alexander*, 12 Penn. St. 81; *Newbold v. Mead*, 57 Penn. St. 487. "Raft" includes logs floated together, though not attached. *Dedrick v. Wood*, 15 Penn. St. 9.

² *Ad quod damnum* is a writ which ought to be sued before the king grant certain liberties, as a fair, market, or such like, which may be prejudicial to others. And thereby it shall be inquired if it should be a prejudice to grant them, and to whom it shall be prejudicial, and what prejudice shall come thereby. There is also another writ of *ad quod damnum*, if any one will turn a common highway, and lay out another way as beneficial. *Termes de la Leye*, 25. In *Fitzherbert*, N. B. 225, D., E., the writ is shown to have been used at common law for purposes similar to those to which it is applied by the Virginia statute. "And if the king will grant to one to make a ditch of a certain length in his own land, ad-

joining to the king's pond, to draw the water from the pool by the ditch to his mill, rendering yearly to the king and his heirs a certain rent, a writ of *ad quod damnum* shall be awarded for to enquire what damage the same will be to the king, and the writ shall recite the grant, and the rent reserved. And if there be an ancient trench or ditch coming from the sea, by which boats and vessels used to pass to the town, if the same be stopped in any part by the outrageousness of the sea, and a man will sue to the king to make a new trench, and to stop the ancient trench, &c., he ought first to sue a writ of *ad quod damnum*, to enquire what damage it will be to the king or others." An ancient highway cannot be changed without the king's license first obtained on an *ad quod damnum*, although an inquisition find that it is no damage to the king to grant the license. *Rex v. Warde*, Cro. Car. 266. The River Thames is an highway and cannot be diverted without an *ad quod damnum*, and to do such a thing ought to be by patent of the king. *Hind v. Manfield*, Noy. Rep. 103. If upon the return of an *ad quod damnum* it appears to be *ad damnum vel prejudicium of no man*, the king may then license the stopping up of an ancient highway, or diverting a watercourse, or part of it, for the concern is then wholly his own; but without

lands upon a stream, owning or projecting a manufactory useful to the public, and desiring to build or enlarge a dam or canal above or below the mill, may obtain, on application to the court of the county where the mill stands, a writ of

his license it can never be done, though a better way be set out and so returned upon an *ad quod damnum*. Thomas v. Sorrell, Vaugh. 341. The original Act of Virginia on the subject of flowage was passed in 1705. 3 Henning's St. at Large, p. 401. It provided that a person willing to build a water-mill, and having only one side of the run, if the owner of land on the other side should refuse to let him have an acre of land adjoining, might petition the court of the county wherein such land lay to authorize him to take such land for the purpose of abutting his dam thereon. Upon such petition the court was empowered to appoint two commissioners to view the land, and if it should not take away housing, orchards, or other immediate conveniences, to value the same and put the party desiring to build the mill in possession thereof. The applicant was required to pay the value so determined, down in money, before taking the land, to build his mill within three years, and rebuild again within three years in case of its destruction, or forfeit his right; and he was not to erect his mill within one mile of any existing mill on the same stream. The owners of such mills were given a remedy by action on the case. In 1745 the Act was amended. 5 Henning's St. at Large, p. 359. The new law required the court, on petition, as before, to issue an order to the sheriff, at the petitioner's cost, commanding him to summon a jury of twelve freeholders of the vicinage, to meet on the land petitioned for, and determine the questions of value and convenience, as before. The owner of land on both sides of the stream was required not to erect a mill with-

out leave from the County Court. The court was required to consider whether others would be injured by flowage, etc.; existing mills were protected, and the title of entailed lands which were taken for mill purposes was confirmed to the mill-owners. In 1785, the law was again amended, and was given something of its present form. 12 Henning's Sts. p. 187. This act provided that the owner or projector of a water-grist mill, desiring to acquire lands on which to abut his dam, should apply to the court of the proper county for a writ of *ad quod damnum*, giving ten days' notice of his application, to the proprietor, upon which a jury should be summoned and proceedings had substantially as under the more recent Acts. The jury were required to view the land, locate by metes and bounds one acre thereof, appraise its value, estimate the probable amount of flowage and of the damages thereby caused; inquire whether any houses, buildings, orchards, or gardens, would be injured; whether the passage of fish and ordinary navigation would be obstructed; whether, and by what means, such obstruction could be prevented; and whether the health of the neighbors would be annoyed by the stagnation of the waters. It retained the restrictions of the former statute; provided that the title to the lands taken should vest on payment of the damages assessed; and that the inquest should be no bar to damages not foreseen. The Statute of 1792 (1 St. at Large, N. S. 136, 137; Abridgment of of Public Laws of Va. 1796, pp. 209, 211) added a provision enabling the owner of any mill to raise his dam by suing out a second writ.

ad quod damnum.¹ The writ requires the sheriff to summon a jury of twelve freeholders, who must view the premises and make inquest upon substantially the same questions as

¹ Code of Va. 1873, Title 19, c. 63. The applicant need not own the land on either side of the stream at the point where the dam is proposed to be located. The Revised Code of 1819, vol. 2, c. 235, provided specially for writs in cases where the applicant owned lands on one side of the stream and the bed of the stream; where he owned the land on both sides, and where, owning the land on one side, the title to the bed of the stream belonging to the Commonwealth, he desired to build a wing-dam, or abut a dam upon an island. The courts held that the petition and record must show facts defining in which of these classes the case belonged; and if the allegations placed the case in a class to which it did not belong, the writ would be quashed;—as, if the applicant alleged that he owned both sides when he owned but one, the writ was quashed. *Whitworth v. Packett*, 2 Gratt. 529. Where he owned but one side, the record must show the title to the bed of the stream to be either in him or the Commonwealth. *Richards v. Hoome*, 2 Wash. 36; *Wroe v. Harris*, 2 Wash. 126; *Home v. Richards*, 4 Call, 441; *Martin v. Beverly*, 5 Call, 444; *Wilkinson v. Mayo*, 3 H. & M. 565. For similar decisions under the Act of Kentucky, see *O'Bannon v. Jackson*, Sneed, 201; *Bibb v. Mountjoy*, 2 Bibb, 1; *M'Affee v. Kennedy*, 1 Litt. 92; *Neale v. Cogar*, 1 A. K. Marsh. 589; *Hamilton v. Adams*, 7 J. J. Marsh, 248; *Wooten v. Campbell*, 7 Dana, 204; *Smith v. Connelly*, 1 Mon. 59. Allegations as to the bed of a stream are unnecessary where the plaintiff owned both sides. *Wroe v. Harris*, 2 Wash. 126. See *accord*. *Neale v. Cogar*, 1 A. K. Marsh. 589. So if he owns both sides, the land for the abutment need not be circumscribed. *Cowan v. Glover*, 3 A. K. Marsh. 356. But in *Meade v.*

Haynes, 3 Rand. 33, it was held that where the stream was unnavigable, and the petitioner owned the bed, the petition was sufficient, though alleging title in the Commonwealth. It is sufficient that the person making the application is in actual possession of the land claiming title. *Pitzer v. Williams*, 2 Rob. 241. The petition may be made *ore tenus*. *Meade v. Haynes*, 3 Rand. 22, 37; *Mairs v. Gallahue*, 9 Gratt. 94. Where upon a fair and reasonable construction the petition and inquisition are substantially responsive to the requirements of the statute, they are sufficient. *Mairs v. Gallahue*, 9 Gratt. 94. Ten days' notice of the application to the tenant of the freehold, upon which it is desired to erect or abut a dam, or through which it is intended to cut a canal, is required by the statute (§ 2). The record must show that ten days' notice was given. *Bernard v. Brewer*, 2 Wash. 76. In the head-note to *Hunter v. Matthews*, 1 Rob. 468, it is said that a judgment on the writ is valid and sufficient though the owner of the land had no notice. No such ruling was made above; an objection for lack of notice was overruled below, but the judgment was reversed above on other grounds; notice to an acting trustee and executor considered. *Coleman v. Moody*, 4 H. & M. 7. A party appearing and contesting the application on the merits cannot afterwards object for defect of notice. *Bernard v. Brewer*, 2 Wash. 76; *Coleman v. Moody*, 4 H. & M. 1. But a party appearing and objecting for lack of notice does not lose his rights by afterwards contesting on the merits. *Pitzer v. Williams*, 2 Rob. 241. Notice to the tenant in possession, who appears to be owner, is sufficient where it is not known who has the legal title. *Pitzer v. Williams*, 2 Rob. 241. The

those provided by the Act of 1785.¹ The findings when completed must be signed by the jurors. If it appears by the inquest that any person not notified will sustain damages, he must be notified to show cause why the applicant shall not have the leave desired. If on the inquest or on *other* evidence it shall appear that any mansion house, or its yards, out-houses, gardens, or orchards will be injured, or the health of the neighbors annoyed by the construction of the pro-

statute apparently contemplates notice to all who will be injured. Sect. 5 provides: "If by such inquest it appear that any person to whom notice has not been given will sustain damage, notice shall be given to him in the manner prescribed by the second section, to show cause why the applicant should not have the leave desired."

¹ See *ante*, § 609. The power to assess damages is in the jury alone. The court cannot increase the amount of damages allowed. But if the court is of opinion that a greater quantity of land will be overflowed than the jury estimated, the court should quash the writ and direct a new one. *Whitworth v. Puckett*, 2 Gratt. 529. The inquisition need not include and award damages for injuries below the dam from a possible breaking of the dam. For such injuries the action at law allowed for unforeseen injuries (§ 11) will lie. *Wroe v. Harris*, 2 Wash. 126. It is not error for the jury to assess the damages caused by flowage and other injuries in one sum. *Coleman v. Moody*, 4 H. & M. 1. On a petition for leave to add to the height of an existing dam, it is error for the jury to assess other damages accruing from the dam as already erected, and which were not contemplated by the original jury. But if such other damages are found separately, that portion of the finding may be stricken off as surplusage, and the verdict sustained. *Eppes v. Cralle*, 1 Munf. 258. An estimate of damages caused by flowage at a cer-

tain sum, and of damages to the proprietor for probable injury to other lands, at a certain sum, is sufficiently certain. *Dawson v. Moons*, 4 Munf. 535. The payment of damages will be presumed after the lapse of a long time, and the erection and maintenance of the works with the acquiescence of the land-owner. *Young v. Price*, 2 Munf. 534. In a case where L., owning lands on both sides of a stream, asked permission of the court to build a mill upon the stream, and a dam across it, it was found by the inquest that lands in possession of A., of the value of thirty-five dollars, would be overflowed. The court, on a hearing, being of the opinion that these lands belonged not to A., but to L. himself, granted L. permission to build his dam without paying any damages to A. Upon appeal this ruling was held erroneous, for the title to the lands could not be thus collaterally tried. In such case permission should be granted only on condition that L. pay A. the damages assessed by the jury; and L. might then build his dam at his peril, without paying the damages, and then defend A.'s action against him on the ground that the lands overflowed were his own, and thus put the title directly in issue. *Anthony v. Lawhorne*, 1 Leigh, 1. If the court directs an issue to try the title involved, the verdict is advisory merely, and the question is open to be heard on the merits. Such a direction is not error. *Wood v. Boughan*, 1 Call, 329.

posed works, the court will refuse permission to erect them.¹ If it shall not so appear, the court may at discretion grant or refuse the permission; if it grant permission, it is required to impose conditions protecting navigation, the passage of fish, and the crossing of the stream.² Upon obtaining permission of court, and paying to the several parties entitled thereto, the compensation ascertained, the applicant becomes seized in fee-simple of the lands circumscribed and located by the jury as necessary to be taken, and is authorized to proceed with his works.³ The applicant acquires title to the

¹ On a conflict of testimony as to the effect of the dam on health, the findings of the trial court will be affirmed. *Home v. Richards*, 2 Call, 425. It is not essential to the validity of the inquisition that it be dated, if it be stated under the hands and seals of the jurors, that they acted "in obedience to the annexed writ." *Dawson v. Moons*, 4 Munf. 535. Any one interested may move to quash the inquest. The service of the same jurors on a previous inquest in the same cause is ground to quash. *Hunter v. Matthews*, 12 Leigh, 228. If the inquest is quashed, the plaintiff should pray a new writ, or except and appeal. *Noel v. Sale*, 1 Call, 495. If the Circuit Court reverses the order to quash, it should remand the cause with directions for further proceedings. *Hunter v. Matthews*, 12 Leigh, 228. A juror's declaration that he agreed to the verdict in consequence of the sheriff's declaration that the defendant had consented to the erection of the mill, is no ground for quashing the writ. *Harwell v. Bennett*, 1 Rand. 282.

² This in effect provides for a new trial by the judge, and invests him with a large discretion whether and upon what conditions to grant permission. In *Mairs v. Gallahue*, 9 Gratt. 94, the court, on giving leave to erect the dam, provided that the applicant should keep a ferry-boat at

the crossing of a public road over the stream, across which the dam was to be erected. It was held that this condition was incident to the grant, and attached to it, into whose hands soever it might pass; and that it imposed on the applicant and his successors the duty of keeping up the ferry and ferrying the public over the stream without charge. In *Humes v. Shugart*, 10 Leigh, 332, the court denied an application, made shortly after a former one, for erecting a mill in the same neighborhood, had been granted.

³ There are further provisions requiring him to begin his works within one year, to complete them within three years, and in case of their destruction, to begin rebuilding within two years, and complete within five years; in default of which, the title to the land taken reverts; or, if held by a life tenant, the reversioner may enter and rebuild under the same limitation. The time for rebuilding has been extended by various acts affecting particular classes of cases, particularly that of mills injured during the Civil War. Acts of Assembly, 1871-2, c. 237, p. 322; 1874, c. 338, p. 456; 1877-8, c. 171, p. 132. The fact that the applicant does not raise his dam in the first instance to the height authorized by the inquest does not preclude him from raising it to the full height authorized by the inquest,

lands so circumscribed and located; but he does not acquire title to the lands overflowed.¹

§ 610. Under the statutes of other Southern and Western States, founded on that of Virginia, although frequently departing more or less from that original, the initiative of proceedings under these statutes lies wholly with the mill-owner or projector. A person likely to be injured cannot, under the statute, recover his damages, even after they have been assessed. The election rests with the applicant, to pay the damages and build his mill, or to discontinue,² and he may dismiss the proceedings without the consent of the other party.³ The injured person is left to his remedies at common law and in equity if the statute is not complied with. The inquest must conform and respond to the questions raised by the statute. An omission to find on any of the questions, as on the effect of the proposed works on health, invalidates the finding.⁴ So of an omission to find as to their effect on navigation, or the passage of fish,⁵ or on houses and gardens,⁶ where required. So the inquest must show that the jury were sworn according to the statute, and charged as the law directs, and that they examined the lands;⁷ must include

provided by so doing he does not occasion injury to others. *Calhoun v. Palmer*, 8 Gratt. 88.

¹ *Whitworth v. Puckett*, 2 Gratt. 531; *Hunter v. Matthews*, 1 Rob. 468. A dam erected in a different place from that authorized by the finding of the jury is, if obstructing the stream or causing injury, an abatable nuisance. *Dimmett v. Eskridge*, 6 Munf. 308.

² *Cave v. Calmes*, 3 A. K. Marsh. 36.

³ *Hunting v. Curtis*, 10 Iowa, 52.

⁴ *Kownslar v. Ward*, 1 Gilmer (Va.) 127; *Trabue v. Macklin*, 4 B. Mon. 407; *Mountjoy v. Oldham*, 1 A. K. Marsh. 535; *Major v. Taylor*, *Ibid.* 552; *Wooten v. Campbell*, 7 Dana, 204; *Gherky v. Haines*, 4 Blackf. 159; *Owen v. Jordan*, 27 Ala. 608. See *Bibb*

v. Mountjoy, 2 Bibb, 1. A finding that health would be "as little annoyed as it was possible" is fatally defective. *Smith v. Waddill*, 11 Leigh, 532. A finding that the health of those living near the pond will probably be injured, is conclusive against petitioners. *Mayo v. Turner*, 1 Munf. 405. For recovery for injuries to health, see notes to § 621, *infra*.

⁵ *Eppes v. Cralle*, 1 Munf. 258; *Shackleford v. Coffey*, 4 J. J. Marsh. 41; *Eubank v. Pence*, 5 Litt. 338; *Owen v. Jordan*, 27 Ala. 608. Such binding is as necessary on an application to enlarge as on one to build a dam. *Kownslar v. Ward*, 1 Gilmer (Va.) 127.

⁶ *Martin v. Rushton*, 42 Ala. 289.

⁷ *Owen v. Jordan*, 27 Ala. 608; *Walters v. Houck*, 7 Jones, 72; *Bibb*

findings as to all proprietors likely to be affected;¹ and show the quantity of injured land belonging to each proprietor, and find the damage to him separately.² Usually it should find the height of the dam.³ And the inquest or judgment should show the location of the mill with sufficient certainty to enable a surveyor to determine its place.⁴

§ 611. The jurisdiction conferred by the statute is special and limited, and the record must therefore affirmatively show every fact necessary to uphold the jurisdiction.⁵ Under the statutes of this system, and sometimes by express provision, the payment of compensation is a condition precedent to the acquisition of the right to flow or injure lands.⁶ The provision that flowage shall not be permitted to injure mansion houses, gardens, orchards, or appurtenances, is in force in Kentucky, West Virginia, North Carolina, Tennessee, Ala-

v. Mountjoy, 2 Bibb, 1; *Shackleford v. Coffey*, 4 J. J. Marsh. 41. If the inquest is incomplete owing to any omission from the charge, the defect is fatal. But if the jury respond to all matters required, although not charged, it is sufficient. *Neale v. Cogar*, 1 Marsh. 589. *Martin v. Rushton*, 42 Ala. 289. See *Walters v. Houck*, 7 Iowa, 72. An inquest which the report shows to have been conducted carelessly and unintelligently will be set aside. *Ibid.*

¹ *Honenstine v. Vaughan*, 7 Blackf. 520.

² *Smith v. Connelly*, 1 B. Mon. 58; *Smith v. Rogers*, Litt. Sel. Cas. 117.

³ *Neale v. Cogar*, 1 Marsh. 589. But this is held unnecessary under the older statutes, where the applicant owns both sides of the stream. *Ibid.* The owner of the dam is entitled to have a permanent record of the height at which he may maintain the dam; of the fact that health will not be injured by it; that his mill is of public use; and of his right to maintain races and other works with his dam. *Wright v. Pugh*, 16 Ind. 106.

⁴ *Macon v. Owen*, 3 Ala. 116. The description, "In number seven, of township nineteen, of range twenty-five," is too uncertain. *Ibid.*

⁵ *Bottoms v. Brewer*, 54 Ala. 288. If the record fails to show that the dam was erected by order of court, or that the mill is a public mill, as defined by statute, the defect is fatal. *Ibid.* In Michigan, the petition was held jurisdictional, and required to show every fact necessary to confer the right, including averments of the non-existence of any fact which would defeat the right; *e.g.* that no existing mill would be injured. *Fox v. Holcomb*, 34 Mich. 298. But in Minnesota the petition is held sufficient if it states facts bringing the case within the authorizing clause (*i.e.* § 1) of the statute. The limitations contained in the other sections need not be negatived, nor want of consent by the respondent be averred. *Faribault v. Hulett*, 10 Minn. 30.

⁶ *Nichols v. Aylor*, 7 Leigh, 546, 562; *Cave v. Calmes*, 3 Marsh. 36; *Kirkendall v. Hunt*, 4 Kansas, 514.

bama, Mississippi, Missouri, Indiana, Iowa, and was formerly in force in Illinois; the provisions protecting navigation and the passage of fish were formerly in force in nearly all the States which adopted the Virginia statute, and are now in force in Kentucky, West Virginia, Mississippi, Missouri, and Nebraska; and that on navigation is in force in these States and in Indiana.¹

§ 612. The principal differences in the Kentucky statute² are a provision for further notice to persons not notified and not attending the inquest, and for holding the cause over in court, for them to appear;³ a provision saving the rights of persons under disability from forfeiture for failure to complete their works in three years;⁴ an omission of the special Virginia provision for the reversioner when the life tenant fails to complete his works in time; and a new section which invests the Circuit Court with power to revoke the permission and abate the dam, upon the presentment of a grand jury, in case public or private injury results from failure to comply with the conditions imposed.⁵

§ 613. The West Virginia statute⁶ provides that the proceedings shall be according to the general statute on emi-

¹ See, *infra*, citations of the statutes of these States. The fact that a spring of water for domestic use will be injured is a sufficient reason for refusing permission to erect a dam. Only a great public necessity will justify such an injury. *Morgan v. Banta*, 1 Bibb, 579; *Trabue v. Macklin*, 4 B. Mon. 407; *McDougle v. Clark*, 7 B. Mon. 448; *Payne v. Taylor*, 3 Marsh. 328. A spring-house is protected as an out-house, within the statute. *Willoughby v. Shipman*, 28 Mo. 50.

² Ky. Gen. St. 1879, c. 77. See St. Feb. 22, 1797 — "An Act to reduce into one the several Acts concerning Mill Dams and other Obstructions in Watercourses." 2 Lit. & Swig. Dig. Ky. St. 938. The statute provides that where the lands lie in two counties, the court of that county

containing the greater portion shall have jurisdiction. By the Act of 1797, the application in such case was required to be to the court of the county where the proposed abutment would be placed. *Dotson v. Sibert*, 4 Bibb, 464.

³ The Act does not require the owner of property injured to be summoned unless he resides in the county, or has a known agent. *Cowan v. Glover*, 3 Marsh. 357.

⁴ The forfeiture provision does not apply to cases where the owner of the mill owns the land on both sides of the stream. *McDougle v. Clark*, 7 B. Mon. 448, 452.

⁵ The Kentucky statute does not apply to or authorize the taking of lands in cities or towns. *O'Bannon v. Jackson*, Sneed, 201.

⁶ 2 Kelly's St. 1879, c. 91, §§ 29-36.

ment domain,¹ for the appointment of commissioners or impanelling of a jury. Their duties are, however, substantially the same as those of the jury under the Virginia Act. All the restrictions imposed by the Virginia Act are retained.

§ 614. In 1812 the Mississippi Territory passed a statute which was in effect an adoption of the Virginia statute then in force, but providing for an inquest by a jury of seven freeholders, and omitting the provisions for the protection of navigation and fish; and this act was the basis of the present statutes in both Alabama and Mississippi.² These changes remain a part of the present statute of Alabama.³ In 1822 Mississippi adopted a new statute, which restored the protection of navigation and fish, and required a jury of twelve freeholders. These provisions are contained in the present statute of Mississippi.⁴ The present statute of Alabama requires the court, on the return of the inquest, to summon the owners of the lands to be affected, to show cause against granting permission; provides for a hearing, and, in effect, a new trial by the court upon the report of the inquest, and "*any other evidence*"; but if the conditions of the statute are complied with, and none of the forbidden results seem likely to follow, the application must be granted.⁵

¹ 2 Kelly's St. 1879, c. 79. The proceedings are begun by petition in writing for the appointment of five commissioners, four of whom constitute a quorum for holding the inquest. If a jury is asked by either party, a writ of *ad quod damnum* issues. The report may be set aside, recommitted, or confirmed. If the petitioner pays into court the amount of damages assessed, although after the report is set aside, he may proceed to take and use the lands without hindrance, paying into court or receiving back the difference between the amount paid and that of the second assessment. The title to lands condemned vests on confirmation of the report and payment of the damages assessed. For a statute investing boom companies with power

to take lands, to enter upon lands and waters of others for the purpose of erecting booms for the purpose of stopping and securing boats and rafts, and for a determination of the compensation due for such injuries, see Acts of West Va. 1877, c. 121, p. 178.

² Statutes of Mississippi Territory (Natchez, 1816), pp. 345 *et seq.*; Tuolmin's Dig., Laws of Alabama, 1823, p. 624.

³ Ala. Code, 1876, part 3, Title 3, c. 17, §§ 3555 *et seq.*

⁴ Miss. Rev. Code, 1824, p. 336, c. 65; Miss. Rev. Code, 1880, c. 27, §§ 924 *et seq.*

⁵ It is the duty of the judge to try the cause anew. *Rushton v. Martin*, 42 Ala. 555. That he has no discretion, see *Hendricks v. Johnson*, 6

The damages assessed must be paid within three months after the granting of the application; and a failure herein operates as a revocation of the grant. The payment vests a conditional fee of the lands in the applicant, to become absolute on the completion of the works within three years, if begun within one month from the date of the permission. One erecting or enlarging a dam, without authority, is made liable to pay double damages to any one injured thereby, and to prosecution, if the dam proves a nuisance.¹

§ 615. The original Missouri statute, passed in 1823,² was substantially a copy of the Virginia Act then in force. It contained in addition provisions saving the rights of persons under disability, from forfeiture for non-completion of their works; and in case of such non-completion within three years, it authorized any other owner on the stream to build works under the Act, having damages to the former works assessed, and paying them; imposed a penal liability to double damages on persons maintaining dams without authority, and declared such dams nuisances. The present statute³ is the result of several revisions and amendments of this Act.⁴ It describes the procedure minutely, requires the petition to contain a description of the lands to be affected and the works proposed, an abstract of the petitioner's title, and a statement of the residences of the persons affected. Such persons are given permission to file objections to the report and show cause, but the court is not required to summon them before it. The court is given power to prevent the erection of dams which would injure lawfully existing mills, upon petition by the owner of such mills.⁵ The privilege of

Porter, 472. The Mississippi statute also requires such parties to be summoned to show cause, but invests the judge with discretion to decide upon all the circumstances. Miss. Rev. Code, 1880, §§ 926, 928. It is not necessary that the finding should be unanimous. If their return be signed by a majority of the jurors, and otherwise conforms to the statute, it is suf-

ficient. *Frost v. Barnes*, 47 Ala. 279; and see *Austin v. Helms*, 65 N. C. 56.

¹ Ala. Code (1876), § 3577.

² 2 Rev. Laws of Mo. 1825, p. 587.

³ Mo. Rev. St. 1879, c. 132, pp. 1259 *et seq.*

⁴ Mo. Rev. St. 1835, pp. 405 *et seq.*; 2 Mo. Rev. St. 1855, c. 112, pp. 1081 *et seq.*

⁵ This provision gives a remedy

maintaining a dam is to cease, in case the dam should obstruct any improvement of navigation undertaken by the State. On failure of the grantee to complete his works in three years, other owners on the stream may take the benefit of the Act "without incurring any liability on account of backing water on such dam."

§ 616. The remedy in Indiana is by the writ of *ad quod damnum*, called "writ of assessment of damages," and the statute¹ is based on that of Virginia. It authorizes the taking of land for raceways; describes the procedure minutely; requires all persons affected to be made defendants; provides that, on objection by the defendant to the report, or plea in bar of the right, issues shall be made up, and the case proceed to trial, judgment, and execution, as a civil case. In case of an application by any person, after having erected his mill-dam, no damages shall be allowed, and the application shall be dismissed, unless the case be such that leave would have been given to build a mill, if the application had been filed before the erection of the mill-dam.²

only in cases in which a mill or other machinery, or a dam which has been erected in pursuance of the Act, is injured by the subsequent erection of a dam or obstruction under the same Act. *Arnold v. Klepper*, 24 Mo. 273. The deepening of the water in the channel of a stream is in itself no ground for damages. Injury must be done to land or property to be ground for compensation. *Hook v. Smith*, 6 Mo. 225; *contra*, see *Little v. Stanback*, 63 N. C. 285; confer *Johnston v. Roane*, 3 Jones (N. C.) 523. The verdict may be objected to by any person who considers himself injured by the building of the proposed dam, and the court must hear the evidence offered if relevant. *Groce v. Zumwalt*, 4 Mo. 567. See *Hunter v. Matthews*, 12 Leigh (Va.) 228. In *Hook v. Smith*, 6 Mo. 225, it was held that when conflicting applications are made on the same day, or within a few days of each

other, the court may exercise its discretion, and grant permission to the one which will cause least damage to individuals. The title of the plaintiff cannot be placed in issue by one not claiming title himself. *Arnold v. Klepper*, 24 Mo. 273.

¹ Ind. Rev. St. (1881), §§ 881-900. (Code of Civil Procedure, article 30.) For the original Act, see Laws of Ind. Ter. (1807), p. 194, closely following the Virginia statute.

² This section is new. By former decisions it had been settled that one who erected a mill-dam without first applying for a writ could not afterwards avail himself of the statute. *Smith v. Olmstead*, 5 Blackf. 37; *Summy v. Mulford*, *Ibid.* 113, 202. But in *Wright v. Pugh*, 16 Ind. 106, the statute was held to authorize the writ in every case where the mill was erected prior to assessment. The present statute, § 883, pl. 9, author-

§ 617. The first Iowa territorial statute, adopted in 1839,

injury any person injured by a mill-dam already built, to have the damages assessed or the dam declared a nuisance, as the case may require. A dam which has been enjoined as a nuisance may be rendered legal by proceedings upon the writ afterwards, and a plea to the inquest alleging in bar such former injunction is insufficient. *Peck v. Van Rensselaer*, 8 Blackf. 312. A person applying for leave to build a dam acquires the right, under the permission, only as against those who were notified as required by the statute, and whose lands the jury find will probably be affected. The proceedings are not a *lis pendens* constituting notice; and actual notice will not bind persons not notified. *Lane v. Miller*, 17 Ind. 58. An appearance in court and objection to the inquest, on the merits merely, is a waiver of notice. *Wood v. Wilson*, 12 Ind. 657. Such appearance waives a formal defect in the oaths of the jurors. *Ibid.* The assessment of damages is reviewable by the court to which the inquest is returned, and may be set aside if too high or too low, and another assessment ordered. *Chapman v. Groves*, 8 Blackf. 309. The question is for the court. *Peck v. Van Rensselaer*, *Ibid.* 312. If an issue is raised upon the inquest as to the amount of damages, it must be disposed of by the court before an order of confirmation is entered. *Wood v. Wilson*, 12 Ind. 657. Where a dam had been built before the writ was issued, but damages were assessed without objection, and the court gave judgment on the assessment, and ordered that, on payment of damages and costs, the petitioner should "have leave to continue his dam, and to flow said lands as they were flowed by said dam at the time of said inquest," it was held that the order was not open to objection by the petitioner for failing to provide for different stages of water

at different seasons. *Chapman v. Groves*, 8 Blackf. 308.

ILLINOIS.—The Virginia Mill Act was adopted by the Territory of Illinois at an early date (*Laws of Indiana Territory*, 1807, p. 194 (including Illinois); 2 *Laws of Ill. Terr.* 1815, p. 456); was re-enacted by the first legislature of the State (*Laws of Ill.* 1819, p. 265); and, with minor changes, remained in force until 1872. (*Rev. St.* 1845, p. 378; *Gross*, *Ill. St.* 1871, c. 71, p. 442. By the revision of 1827, four weeks' notice in writing of the application was required, and notice to owners mentioned in the inquest, to show cause. The protection to navigation and fish was omitted. *Ill. Rev. Laws*, 1827, p. 297.) By the Act of 1872 this method of procedure was abolished, and that authorized by the statute upon eminent domain substituted. This is by petition, and an assessment by a jury of twelve freeholders. (*Ill. Pub. Laws*, 1871-72, p. 563; *Rev. St.* 1883, c. 92. For statute on eminent domain, see *Rev. St.* 1883, c. 47.) The Act of 1872 requires a publication of notice of application for sixty days, and personal notice to all persons interested, whose residences are known. Provisions protecting existing mills and mill-sites were retained; those protecting dwellings, appurtenances, and gardens were omitted. There is but one reported case in which the statute is shown to have been invoked, and then only incidentally. In an action on the case for injury to the plaintiff's mill by the erection of a dam by the defendant on his own land, the plaintiff showed that he had built his dam by permission of court, obtained by proceedings on the writ of *ad quod damnum*. The court held that, while the defendant had a right to erect a dam upon his own land, he had no right to injure the plaintiff; and that the plaintiff could recover nominal damages on

was a copy of the Illinois statute then in force.¹ In 1855 the statute was altered.² A copy of the petition was required to be served by way of notice; the ten days' period of notice was restored; and the clerk of court was required to summon the parties affected to show cause. By the code of 1873, now in force,³ the applicant is required simply to file his petition, describing all lands and naming all owners likely to be affected, whereupon the clerk issues an order including a copy of the petition, to be served by the sheriff as an original notice in beginning an action. A jury of twelve freeholders are then summoned, who are authorized to examine witnesses as well as view the premises, and the further proceedings and principal conditions upon which the right is granted are similar to those in other States in which acts of the Virginia system are in force. The defendants may file written objections to the report, and for proper cause obtain a new jury to re-assess the damages. Either party may appeal to the court where the proceedings are pending for the assessment within thirty days, and appeals are tried and disposed of as in civil causes.⁴

proving flowage of his land. *Hill v. Ward*, 2 Gilman, 285.

¹ Iowa Ter. Sts. 1839, p. 343. This was re-enacted in 1843, with additions protecting mills and their appurtenances from diversion or injury, under penalty of treble damages. Iowa Ter. Sts. 1843, p. 437. The present statute provides for single damages. Code 1882, § 1205.

² Iowa Laws, 1855, c. 92, p. 151; Revision of 1860, Title 11, c. 54, art. 4, p. 211.

³ Code 1873, Title 10, c. 1, §§ 1188-1206; Code 1882, Id.

⁴ Code 1882, §§ 1114, 1254. It is not necessary that proceedings be had before the work is begun. They may be instituted while the work is in progress. *Burnham v. Thompson*, 35 Iowa, 421. But an action will lie at common law for damages caused by the work before the proceedings began. *Watson v. Van Meter*, 43 Iowa,

76. Compare Indiana Statute, *supra*. The petition need not be verified. Signature by counsel is sufficient. *Gammell v. Potter*, 2 Iowa (Cole's ed.), 562. Under the later statutes, notice may be given to the defendant after the petition has been filed, provided it is given in sufficient time. *Hoag v. Denton*, 20 Iowa, 118. Under the former statute notice was required to precede the petition. *Gammell v. Potter*, 2 Iowa (Cole's ed.), 562. Where the first writ is quashed and a second one issues, no further notice is necessary. *Burnham v. Thompson*, 35 Iowa, 421. The defendant may plead and prove facts tending to show that the granting of the license would be unreasonable or not for the public benefit; but not matters tending only to impeach the finding. The finding is conclusive until set aside. Misconduct of the jurors, and interference with them by the plaintiff,

§ 618. In 1824, the territory of Michigan adopted the Massachusetts Act of 1795;¹ but in 1828, the portions of the Act relating to flowage, and the remedies therefor, were repealed.² In 1865, a new statute was passed, which was precisely similar to that of Connecticut, passed in the preceding year.³ In 1871,⁴ the proviso that the court should add fifty per cent. to the amount of damages found by the committee or jury was repealed. In 1873,⁵ the act was revised and amended. The new Act more fully resembled that of Massachusetts. It required the hearing of pleas in bar to precede the inquest, and secured the rights of land-owners who were not residents of the State, and persons under disability. A case arising under it was determined by the Supreme Court, in 1876,⁶ but in 1877 the act was held unconstitutional.⁷

§ 619. The statute in force in Nebraska, which took effect in 1873,⁸ is an adoption of the principal provisions of the later statutes founded on the Virginia Mill Act. Special provision is made for notice to non-resident defendants by publication. In a recent case the Supreme Court held that a mill-owner will not be allowed to increase the height of his dam so as to injure the owner of a mill-site above, who has begun the erection of another mill.⁹

are grounds only for setting aside the inquest. For an improper assessment, the remedy is either a motion to set aside or the action for damages not provided for. *Gammell v. Potter*, 6 Iowa, 548. An order of court overruling a motion to set aside the verdict and quash the writ is appealable, though no judgment has been rendered. *Burnham v. Thompson*, 35 Iowa, 421.

¹ 2 Mich. Ter. Laws (1824), reprint, 1874, p. 192.

² Ibid. p. 699 (1828).

³ Mich. Laws of 1865, No. 304, p. 651.

⁴ Mich. Laws of 1871, No. 56, p. 67; 2 Compiled Laws, 1871, c. 221.

⁵ Mich. Laws of 1873, No. 196, p. 486.

⁶ In *Fox v. Holcomb*, 34 Mich. 298, the case concerned a dam across a navigable stream. The State constitution forbids the damming of such streams, except by authority from the supervisors of the proper county. The court held that permission of court in proceedings under the Act would not dispense with this authority, and that the petition must show that such authority had been obtained.

⁷ *Ryerson v. Brown*, 35 Mich. 333; ante, § 214.

⁸ Neb. Compiled Sts. 1881, c. 57, p. 355.

⁹ *Secley v. Bridges*, 13 Neb. 547.

§ 620. The statutes of Kansas¹ and Minnesota² closely resemble each other. Their peculiarity is in prescribing an order in which the different amounts of damages assessed shall be paid. The assessments are made by three commissioners, and the method of review is by appeal to the court appointing them, upon which issues are made up and the case is tried and heard as a civil case, with the right of further appeal. Actions at common law for damages are limited to be brought within two years from the erection of the dam,³ and the courts are authorized to suspend proceedings in any action at law begun after the institution of statutory proceedings, until such proceedings are determined.

§ 621. The North Carolina statute⁴ differs from those of other States in prescribing two sets of proceedings. The first is begun by petition by the owner or projector of a mill to obtain permission to build the mill and dam and to acquire the land on the opposite side of the stream. The petition is

¹ Kansas Compiled Laws, c. 66.

² Minn. Sts. 1878, c. 31. Rights acquired under the statute date from the beginning of proceedings. If at that time the petitioner has to any extent made improvement of the power with the *bona fide* intention to use it as a water-power, it is a "power previously improved," under § 16 of the statute. *Miller v. Troost*, 14 Minn. 365. An appeal from the award of the commissioners brings up to the District Court only the question of the propriety of the damages assessed. Therefore, a motion to set aside the order appointing commissioners, is not entertainable by the District Court. The appeal lies only after the entry of judgment. *Turner v. Holleran*, 11 Minn. 253. The petitioner cannot, after appeal and judgment, object to judgment in favor of an owner, on the ground that a mortgage on his interest, which existed prior to such proceedings, has been since foreclosed, and such owner's interest divested. It will be presumed in such case that damages were as-

sessed on the basis of the mortgagor's interest only, and if the party instituting the proceedings omitted on the trial to prove the existence of such mortgage, he must excuse his omission before he can be relieved from the effects thereof. *Siman v. Rhoades*, 24 Minn. 25. The Act must be strictly complied with to give rights thereunder. *Akin v. Davis*, 11 Kansas, 580. The right of flowage acquired under the statute, does not include the right to flow a highway. *Venard v. Cross*, 8 Kansas, 248.

³ In *Thornton v. Turner*, 11 Minn. 336, it is held that until damage is occasioned the statute does not begin to run. See *Eastman v. St. Anthony Co.*, 12 Minn. 137, 143. This provision does not extend to actions to abate or enjoin a nuisance. *Ibid.* *Cook v. Kendall*, 13 Minn. 324; *Thornton v. Webb*, 13 Minn. 498.

⁴ *Tourgee's Code*, with notes, 1878, Part II., c. 5. See *Battle's Code*, 1873, c. 72. For the original Act, see Act of 1777, 1 Rev. Laws of N. Car. 1821, c. 122.

open to objection or answer, issues of fact being tried by a jury;¹ but if granted, a commission of three freeholders is appointed by the court, whose duties are like those of commissioners under the Virginia Acts (omitting the inquest of damages to lands not taken, and of injuries to navigation and the passage of fish). The court has discretion to permit either the petitioner or the opposite proprietor to build the mill. The second series of proceedings is in the nature of an action by persons whose property is injured by the dam, to recover compensation, and is begun by summons and complaint, upon which issues of law and fact are tried and determined as in civil actions.² If the mill-owner is insolvent or

¹ Jones v. Clarke, 7 Jones, 418. See Sumner v. Miller, 64 N. C. 688.

² The former statute required a petition (see Mumford v. Terry, 2 Law Repos. 425), a hearing of the petition, including a trial by jury, if necessary; the appointment of a second commission, to inquire, summon, and hear witnesses, and report; a hearing of objections to the report; and on appeal, a trial by jury, of issues made on the report, before reaching judgment. The assessment was to be of annual damages, and to be binding for five years, unless the dam and flowage should be altered. The payments for each year were collectable by execution to be sued out on the judgment rendered on the report. See Gillet v. Jones, 1 Dev. & B. 339. If the annual damages were found to exceed twenty dollars, the judgment was binding only for the year preceding. Battle's N. Car. Code, 1873, §§ 13-18. After the expiration of the five years, the damages for the ensuing year were recoverable only by a new petition. William v. Canaday, 11 Ired. L. 106. The present statute contemplates the assessment of annual damages, and limits the effect of a finding of above twenty dollars to the preceding year, but has repealed the five-year limit of § 15

(Code of 1873, c. 72) without fixing any other limit.

a. Proceedings to Condemn.—The defendants have a right to appeal from an interlocutory order appointing four freeholders. Minor v. Harris, Phil. Law, 322. *b. In Proceedings to Recover Damages.*—The act causing injury is a tort. The statute has not changed its character. Wilson v. Myers, 4 Hawks, 73. The liability for an act by several is therefore joint and several, and survives against the survivors. Ibid. It was formerly held that the liability did not survive against the heir. Fellow v. Fulgham, 3 Murph. 254. But the executors are liable for their testator's act under the statute. Howcott v. Coffield, 7 Ired. 24. The mill-owner cannot escape liability by conveying his mill away. Purcell v. McCallum, 1 Dev. & B. 221. Only one whose land is injured can maintain an action under the statute; but he may recover for any injury resulting from the overflowing of his land. Waddy v. Johnson, 5 Ired. 333. Injury to the health of his family, or healthfulness of the property, resulting from such cause, is ground for recovery. Ibid.; Gillet v. Jones, 1 Dev. & B. 339. But such injury must result from the inundation of his own land. The plaintiff

the judgment cannot be collected, the court has power to order the abatement of the dam or of the portion causing the injury as a nuisance.

§ 622. Tennessee at first adopted the original North Caro-

cannot recover for such an injury resulting from *other parts* of the mill-pond, and is confined to his allegations. *Bridges v. Purcell*, 1 Ired. 232. An intermittent injury, by flowage at certain seasons, is ground for recovery. *Pugh v. Wheeler*, 2 Dev. & B. 50. Where flowage is shown, the land-owner is entitled to nominal damages, though no actual damage is shown. *Wright v. Stowe*, 4 Jones, 516; *Little v. Stanback*, 63 N. C. 285. The land-owner is entitled to have the question whether the flowage was an injury submitted to the jury; benefits which the land may have received from such cause are immaterial. *Kimel v. Kimel*, 4 Jones, 121. The land need not be overflowed to constitute an injury. A prevention of drainage is an injury. *Johnston v. Roane*, 3 Jones, 523. So the raising of the stream within its banks is an injury. *Little v. Stanback*, 63 N. C. 285. See *contra*, *Hook v. Smith*, 6 Mo. 225. Possession alone is sufficient ground to support a petition for injuries done under the Act. *Pace v. Freeman*, 10 Ired. 103. A license by the plaintiff's ancestor is no bar to the complaint. It died with the ancestor. *Bridges v. Purcell*, 1 Dev. & B. 492. So twelve years' delay is no bar. *Griffin v. Foster*, 8 Jones, 337. On the other hand, one injured by a mill need not wait till the expiration of the first year before bringing his action. But the past damages will be confined to the time during which the injury has existed. *Cochran v. Wood*, 6 Ired. 194. It was not necessary in proceedings to recover damages to serve a copy of the petition. A written notice of intention, served ten days before filing the petition, was sufficient. *Cox v. Buis*, 12 Ired. 139. A description

of the mill in the petition, as a public mill or a mill for grinding for toll, is sufficient. *Little v. Stanback*, 63 N. C. 285. The jury appointed to try the issues on the petition for damages had formerly no right to assess the damages; that was the province of the commission. On appeal, the issues on the allegations must be submitted to the jury before the damages are inquired into. *Jones v. Clark*, 7 Jones, 418. As the statute forbids an injury to dwelling-houses, such injuries cannot be included in the inquest of damages. *Burgess v. Clark*, 13 Ired. 109. The verdict is conclusive on damages up to the time when the verdict was rendered. *Beatty v. Conner*, 12 Ired. 341. The signatures of a majority of the commission to the report were sufficient to make it valid. See *Frost v. Barnes*, 47 Ala. 279, *accord*. If the dam is altered or taken down, this will be ground for reducing the annual damages on a writ of *audita querela*. *Gillet v. Jones*, 1 Dev. & B. 339. (See *accord*. Massachusetts and Wisconsin cases; *supra*, on Massachusetts Act.) But a temporary or accidental washing out of the dam will not be ground for reducing the damages. *Beatty v. Conner*, 12 Ired. 341. Irregularities previous to the verdict are no ground for dismissing an appeal. The trial must be had at bar in the Superior Court. *Harper v. Miller*, 4 Ired. 34. An early case held that the jury, on appeal, must meet on the premises. *Andrews v. Johnson*, 1 Law Repos. 272. On appeal the Superior Court may permit the sheriff to amend his return of the verdict, so as to set forth that they were sworn on the premises. *Harper v. Miller*, 4 Ired. 34.

lina statute of 1777;¹ and this statute with only minor changes is still in force. In its present form it provides for the condemnation of the acre upon the opposite side of the stream on which to abut the dam, but makes no reference to compensation for flowage or other damages to lands not taken. The proceedings are begun by petition, upon which a summons issues to the proprietor of the acre; and at the same time a commission of four freeholders is appointed to lay off and value the acre and report. The court may in its discretion permit either the plaintiff or the opposite proprietor to build the mill. An appeal lies from the order of the County Court to the Circuit Court.² The statute contains the Virginia clauses protecting dwellings and their appurtenances, and other mills.³

§ 623. In Georgia an Act was passed in 1869,⁴ extending the provisions of an Act authorizing a railway company to take lands, to all persons desiring to build mills and dams; but it was shortly after held unconstitutional.⁵ In Delaware,⁶ Arkansas,⁷ Florida,⁸ and Oregon,⁹ statutes belonging to the Virginia system are in force, but there are no reported decisions of cases arising under them.

¹ 1 Tenn. St. 1871, c. 10, §§ 1910-1920. The statute was enacted almost in its present form in 1777. See Rev. Laws Tenn. 1809, c. 23, p. 101; 1 Rev. Laws, N. C. 1821, c. 122.

² The appeal is triable *de novo* in the Circuit Court, and is not merely for review. *Towson v. Debow*, 5 Sneed, 193.

³ The Act authorizes such taking only for grist-mills. If the petitioner has any rights by virtue of a contract with the owner, he must resort to the ordinary remedies at law and in equity to enforce them, and cannot enforce them in proceedings under the statute. *Harding v. Goodlett*, 3 Yerger, 41.

⁴ Ga. Laws, 1869, p. 114.

⁵ *Loughbridge v. Harris*, 42 Ga. 500.

⁶ Del. Rev. St. 1852 (ed. 1874), c. 61, p. 348. A separate Act which has been incorporated with the Mill Act provides that the owner of an upper mill, before voluntarily discharging an unusual quantity of water, is bound to give notice to the mill-owner below, and that for neglecting this duty he shall be liable to double damages. *Ibid.* § 3 (Act of 1819). This liability is enforceable by an action on the case. *McIlvaine v. Marshall*, 3 Har. 1; *Ross v. Horsey*, 3 Har. 60.

⁷ Ark. St. 1874, c. 95.

⁸ *McClellan's Dig. Laws of Fla.* c. 152.

⁹ Gen. Laws, Oregon, 1874, p. 679 (Misc. Laws, c. 37).

APPENDIX.

- p. 71, N. 6. Add *Robins v. Ackerly*, 91 N. Y. 98.
- p. 81, N. 3. Relief against exorbitant wharfage cannot be had in the United States Circuit Courts, upon the allegation that the wharfage was intended as a duty of tonnage, the alleged intent not being traversable. *Transportation Co. v. Parkersburg*, 107 U. S. 691.
- p. 82, N. 6. A State may impose a license fee, either directly or through one of its municipal corporations, upon ferry-keepers who live in the State, for boats which they run and use in conveying passengers and goods from a landing in the State across a navigable river to a landing in another State. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.
- p. 123, N. 4, and p. 143, N. 1. Compare *Ravenswood v. Fleming* (W. Va.), 28 Alb. L. Jour. 295.
- p. 161, N. 2. The same is held of a several fishery. *Neill v. Devonshire*, 8 App. Cas. 135.
- p. 189, N. 4. Add *McKensie v. Mississippi Boom Co.*, 29 Minn. 288; *Weaver v. Mississippi Boom Co.*, 28 Minn. 534.
- p. 193, N. 4. Add *Backus v. Detroit*, 49 Mich. 110.
- p. 198, N. 1. Add *White River Log Co. v. Nelson*, 45 Mich. 578; *Buchanan v. Grand River Log Co.*, 48 Mich. 364.
- p. 246, N. 5. See *accord.*, *Escabana Co. v. Chicago*, 107 U. S. 678.
- p. 330, N. 4. A riparian proprietor upon an unnavigable stream is entitled to compensation only for land taken, and not for the value of his right of fishery in the stream, when a town, which is authorized by the legislature for that purpose, makes improvements for the preservation and taking of alewives in a great pond and the waters connected therewith, of which his stream is a part, the act providing for the payment of all damages "sustained in any way by any persons in their property, in carrying into effect this act," and that any fishery so created should be the property of the town. *Cole v. Eastham*, 133 Mass. 65.
- p. 333, N. 1. See *Robins v. Ackerly*, 91 N. Y. 98, questioning *Lowndes v. Dickerson*, 34 Barb. 586.

- p. 336, n. 5. Add *Julien v. Woodsmall*, 82 Ind. 568.
- p. 377, n. 6. As to remedy by information in equity in such case, see *Attorney General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361.
- p. 393, n. 2. See *Red River Roller Mills v. Wright*, 30 Minn. 249.
- p. 398, n. 7. See *Kensit v. Great Eastern Railway Co.*, 31 W. R. 603; *Ormerod v. Todmorden Joint Stock Mill Co.*, 52 L. J. 445.
- p. 401, n. 2. See *Peter v. Caswell*, 38 Ohio St. 518.
- p. 418, n. 5. Water, when severed from land, and artificially stored, is private property and the subject of larceny at common law. *Ferens v. O'Brien*, 11 Q. B. D. 21.
- p. 531, with § 324, as to oral license to flow land. See 28 Alb. L. J. 144, 165; *Johnson v. Skillman*, 29 Minn. 144.
- p. 550, n. 5. A statute which forbids the discharge of polluting matter into any stream used as a source of water supply by any city or town, prevents the acquisition of a prescriptive right to foul a stream as against the city or town so using the stream. *Brookline v. Mackintosh*, 133 Mass. 215.
- p. 564, n. 5. See *Watson v. Troughton*, 48 L. T. n. s. 508.
- p. 581, n. 2. Add 16 Vin. Abr. 509, pl. 10.
- p. 582, n. 3. After *Marsh v. Trullinger*, 6 Oregon, 356, add, See *Blood v. Light*, 31 Cal. 115.
- p. 602, n. 4. (*ad finem*.) An agent maintaining a dam for his principal, and not himself having possession or control, is not chargeable for injuries caused by such continuance of the dam. *Brown Paper Co. v. Dean*, 123 Mass. 267. But on an *indictment* for maintaining a nuisance, such agency is no defence. *State v. Bell*, 5 Porter, 365.
- p. 620, n. 2. (*ad finem*.) See *Thornton v. Turner*, 11 Minn. 336.
- p. 627, n. 2. See *contra*, that all damages are included in depreciation of value. *C. R. I. & P. Railroad Co. v. Carey*, 90 Ill. 514.
- p. 632, n. 1. (*ad finem*.) That such cost should be considered, instead of permanent depreciation of value, see *C. R. I. & P. Railroad v. Carey*, 90 Ill. 514.
- p. 660, n. 1. See *Brugger v. Butler*, 6 Oregon, 459.
- p. 666, n. 3. See *Mullett v. Bemis*, 100 Mass. 92.
- p. 683, n. 2. (*ad finem*.) Injuries to the plaintiff by his own dam cannot be shown in bar or mitigation. The doctrine of contributory negligence does not apply. *Clarke v. French*, 122 Mass. 419; *Brown v. Dean*, 123 Mass. 254. So the plaintiff is entitled to free navigation though he himself obstructs the stream. Such obstruction cannot be shown in bar. *Olsen v. Merrill*, 42 Wis. 203.

- p. 698, N. 1. (*ad finem.*) Add *Norris v. Hill*, 1 Mich. 202.
- p. 714, N. 1. That the statute of limitations on actions for damages does not extend to actions to enjoin or abate, see *Cook v. Kendall*, 13 Minn. 324; *Thornton v. Webb*, 13 Minn. 498.
- p. 720, N. 1. That allegations must show injuries of such rights, see *Norris v. Hill*, 1 Mich. 202.
- p. 760, 1st column of notes, after "proposition." Add, And see *Trustees v. Tuttle*, 30 Ohio St. 62; *Venard v. Cross*, 8 Kansas, 248.
- p. 763, 1st column of notes, 4th line from bottom. With *Bryan v. Burnett*, see *Dixon v. Eaton*, 68 Maine, 542.
- p. 770, N. 2. (*ad finem.*) So for injuries caused by dams erected to create artificial floods and float logs to market, the remedy is in case. *Dubois v. Glaub*, 52 Penn. St. 238.
- p. 771, N. 3. (*ad finem.*) So the remedy under the Act does not extend to trespasses. *Henley v. Wilson*, 77 N. C. 216.
- p. 772, N. 2. (*ad finem.*) See *Tiarney v. Smith*, 86 Ill. 391. A reservation in the Act of power of abatement does not exclude equitable jurisdiction therefor. *State v. Bell*, 5 Porter, 365.
- p. 775, N. 1. Add *Hooker v. Greene*, 50 Wis. 271. But an amendment to the general Act amends such special Act. *Id.*
- p. 784, N. 2. An assessment may be had by *certiorari*, if omitted from the proceedings. *Phillips v. Commissioners*, 122 Mass. 258.
- p. 794, N. 2. (*ad finem.*) So on petition to abate water, there is no right to jury trial. But the court may take advisory verdict or report. *Coheco v. Strafford*, 51 N. H. 455.
- p. 385, 9th line. Omit "and Wisconsin."

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